115-550

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~928~~. 60

T. W. THOMPSON, APPELLANT,

vs.

ALLEN COUNTY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED OCTOBER 9, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Proceedings of the circuit court of the United States for the district of Kentucky at a regular term of said court, begun and held at Louisville, on Monday, February 20th, 1882.

Present: The Hon. Stanley Matthews, Associate Justice of the Supreme Court of the United States, and the Hon. John Baxter, circuit judge of the United States for the sixth circuit.

Caption.

T. W. THOMPSON, Complainant, *vs.* ALLEN COUNTY *et al.*, Defendants.

Be it remembered that heretofore, to wit, on the 13th day of December, 1881, came the complainant, by W. O. & J. L. Dodd, his counsel, and filed his bill of complaint herein, which is as follows:

Bill of Complaint.

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

To the honorable the judges of the circuit court of the United States for the sixth circuit and district of Kentucky, sitting
2 in equity:

Your orator, T. W. Thompson, a citizen of the State of Illinois, brings this his bill of complaint against Allen County, a municipal corporation of the State of Kentucky, organized under its laws, and Absolum Bailey, J. M. Bailey, T. W. and F. M. Berton, James A. Bright, Wm. Briley, W. H. Brown, Sr., J. H. Gibson, T. R. Hughes, F. G. Mitchell, Samuel J. Reed, A. J. Richey, T. J. Settle, Sr., A. S. Walker, P. W. Justice, E. C. Moore, John Banten, John Devesher, Jeremiah Horston, Simpson Moore, E. P. Neal, Samuel Sears, Samuel E. Hudson, E. Prewitt, James R. Cheney, Wm. Devesher, A. H. Trovelstead, John Dixon, Wm. R. Downing, W. S. Porter, assignee of T. H. Page, and Ben. Downing, Sr., all citizens of the said Allen county and State of Kentucky, and complaining, showeth unto your honors that heretofore, to wit, on the 21st day of February, 1878, your orator recovered a judgment in this court against the defendant, Allen County, for the sum of seven thousand and thirty-two $\frac{13}{100}$ ($7,032.13) dollars, with interest thereon from the said date at the rate of six per cent. per annum until paid, and sixty-one $\frac{85}{100}$ dollars
3 ($61.85) costs in the said suit expended. That subsequently, to wit, on the sixth day of October, 1879, your orator recovered another and further judgment against the said Allen County for the sum of fifteen thousand one hundred and fifty-five $\frac{90}{100}$ ($15,155.90) dollars, with interest thereon at the rate of six per cent. per annum from said date until paid, and eighty-eight $\frac{26}{100}$ ($88.26) dollars costs in that suit expended. That both of the said judgments were based upon coupons for interest which had accrued on certain bonds which had been issued, sold, and delivered by the said Allen County in payment of a subscription duly made by it to the capital stock of the Cumberland and Ohio Railroad Company, and of which your orator became the owner and holder by purchase. That thereafter, in due course, your orator caused executions to be

issued on the said judgments and placed into the ha nds of the marshal, and the same were afterwards returned by him, endorsed: No property found out of which to satisfy the same or any part thereof.

Your orator further showeth that by the laws of Kentucky it was the duty of the county court of the defendant, Allen County, to levy and cause to be collected a tax upon all the taxable property situated in the said county of Allen as listed and taxed under the revenue laws of the said State of Kentucky a sum sufficient to pay the judgments aforesaid, including the costs of collecting the same; that your orator demanded of the said county court that it levy and cause to be collected from the taxpayers of the said county a sum sufficient to satisfy and pay his aforesaid judgments, interest, and costs, which it refused to do; and thereupon, on the 7th day of October, 1880, your orator applied in due form of law to this court for and obtained a mandamus against the justices and judge of Allen county court, composing the county court of the defendant, Allen County, commanding them to levy and cause to be collected from the taxable property in the said county a sum sufficient to pay and satisfy the aforesaid judgments, interests, and the costs of collecting the same, and upon the hearing thereof the same was made peremptory, and thereupon and in obedience thereto the said Allen county court did duly assemble on the 28th day of May, 1881, and levy a tax of two dollars and eight cents ($2.08) on each one hundred dollars' worth of taxable property and fractional part thereof situate in or belonging to the taxpayers of the said Allen county, as the same was listed for taxation for revenue purposes for the year 1881, with the assessor of the said county, and appointed one J. T. Stork as collector, who was required to execute bond, to be approved by the said county court, and then to proceed at once to collect the said levy and pay the same over in satisfaction of the said judgments aforesaid to your orator or his attorney. The proceedings of the said court on the said occasion as appears from the records of the said county court are in words and figures as follows, to wit:

"ALLEN COUNTY, *May 28th*, 1881.

"At a called county court began and held for the county of Allen, at the court-house thereof, in the town of Scottville, on Saturday, May 28th, 1881, for the purpose of making a levy upon the taxable property of the taxpayers of said county in obedience to a writ of mandamus which issued from the United States circuit court for the district of Kentucky, at Louisville, on the 9th day of March, 1881—

"Present: N. C. Ritchford, judge, presiding, and Peter Hundsman, W. H. Meng, E. Prewett, John Dixon, Jno. Eddy, D. N. Hendrich, J. N. Hunt, H. T. Tracy, Wm. Orr, R. D. Anthony, R. D. Harris, and W. T. Devesher, justices of the peace for said (Allen) county.

"In obedience to the peremptory order of the United States circuit court for the district of Kentucky, at Louisville, it is now ordered that a levy of two dollars and eight cents ($2.08) on each one hun-

dred dollars' worth of taxable property and fractional part thereof be, and is hereby, levied upon the property of the taxpayer- of Allen county listed for taxation for revenue purposes for the year 1881, with the assessor of said county, which is one million three hundred and forty-three thousand six hundred and ninety-two dollars ($1,343,692) to pay the judgments in favor of T. W. Thompson against said (Allen) County, which judgments, with the interest to this date and costs & commissions for collecting, amount to
7 ($27,925.75) twenty-seven thousand nine hundred and twenty-five dollars and seventy-five cents; the foregoing magistrates and county judge voting for and in favor of said levy, and, on motion, the court proceeded to elect and appoint a collector, in further obedience to the writ or mandamus against them, when J. T. Stork and Samuel Witherspoon were placed in nomination for collector of the tax this day levied, and J. T. Stork, receiving a majority of the ballots cast, was declared duly elected. It is now ordered by the court that J. T. Stork be, and is hereby, appointed collector of said levy upon his executing bond with approved security before the county court, and he will proceed at once to collect said levy and pay the same over in satisfaction of the judgments heretofore named in favor of T. W. Thompson, or to his attorney." All of which will appear by reference to an attested copy of the said order, and the papers on file in the said mandamus case No. 4572 in this court, which are here referred to and made a part of this bill.

Your orator states that the J. T. Stork, appointed collector
8 to collect the said levy, as stated in the foregoing order, although often requested so to do, has never accepted the said appointment nor qualified as such collector, but has declined so to do, and the said county court well knew at the time of his said appointment that he was hostile to the payment of the said tax, and would not accept nor qualify as such collector, and the said county court has not appointed any other person collector in lieu of the said J. T. Stork. Your orator states that the sentiments and feelings of a large majority of the citizens and taxpayers of the said Allen county are very hostile and outspoken against the collection or payment of the said tax, and the said hostile feeling is widespread and almost unanimous among the citizens of said Allen county, and on divers occasions they have uttered threats of bodily harm to any person who will undertake the collection of the said tax. Your orator states that the county court of the said Allen county claim that by reason of the said hostility, threats, and intimidation on the part of
9 the taxpayers it cannot find any person who will accept the appointment as collector and undertake the collection of the said levy, and your orator cannot find any person within the said Allen county who is willing to accept the said appointment and qualify as such collector because of the threats and hostility aforesaid.

Your orator states that all of the taxable property in the said Allen county was listed with the assessor of the said county for the year 1881 for taxation for revenue purposes, and amounted in the aggregate to the sum of one million three hundred and forty-three

thousand six hundred and ninety-two dollars, as will more fully appear by reference to a certified copy of the said assessment, which will be filed herein and made a part hereof, marked Exhibit "A;" the said assessment shows the name of each taxpayer of Allen county for the year 1881, together with the amount, kind, and value of the property listed by him or her for taxation for revenue purposes set opposite said names.

Your orator states that the taxpayers of Allen county for
10 the year 1881, against whom the aforesaid assessment was made and upon whom the aforesaid special tax was levied to pay your orator's judgments as aforesaid, are so numerous that it is impracticable to bring them all before this court within a reasonable time and without great cost; that the question of the right of your orator to enforce his said judgments by requiring the said taxpayers to pay into this court, or to a receiver to be appointed herein, the several sums due by them to the said Allen county on account of the aforesaid levy of May 28, 1881, and in regard to which the said Allen county has the legal and your orator the equitable interest, is one of common and general interest, and that the persons herein made defendants; upon whom, in common with the others, the said tax was levied, are among the largest, most influential, and prominent property holders and taxpayers of the said county, and can fully and fairly defend for all, and should be permitted and required so to do. The names of the said defendants, together with the value of the property assessed against
11 them and liable on the special levy to satisfy your orator's judgments aforesaid, and the amount due by them to Allen county for your orator's use and benefit are set forth as follows:

Names of defendants.	Assessment.	Am't of tax.
Absalom Bailey	925 00	19 24
J. M. Bailey	3,195 00	66 46
T. W. and F. M. Burton	3,150 00	65 52
James A. Bright	3,440 00	71 55
Wm. Briley	1,840 00	38 27
W. H. Brown, Sr.	3,560 00	74 05
J. H. Gibson	4,987 00	103 73
T. R. Hughes	8,366 00	174 01
F. G. Mitchell	4,880 00	101 50
Sam'l J. Reed	4,000 00	83 20
A. J. Richey	4,420 00	91 94
T. J. Settle, Sr.	8,855 00	184 18
A. S. Walker	5,945 00	123 66
P. W. Justice	4,675 00	97 24
E. C. Moore	4,842 00	100 71
John Bantar	8,420 00	175 14
John Devesher	9,867 00	205 23
Jeremiah Horston	6,940 00	144 35
Simpson Moore	9,285 00	193 13
E. P. Neal	26,200 00	544 96

Names of defendants.	Assessment.	Am't of tax.
Samuel Sears	6,725 00	139 88
Samuel E. Hudson	7,055 00	146 74
12 James R. Cheney	5,085 00	105 77
A. H. Trovelstead	10,565 00	219 75
Wm. R. Downing	5,020 00	104 47
Ben. Downing, Sr.	4,295 00	89 34
E. Prewitt	2,900 00	60 32
Wm. T. Devesher	1,460 00	30 37
Jno. Dixon	1,058 00	22 11
W. L. Porter, assignee of J. H. Page	13,500 00	280 80

Your orator states that by virtue of the said assessment and levy the said several defendants became, and they are now, severally indebted to the defendant, Allen County, in the sums set opposite to their respective names, which indebtedness, together with that of all the other taxpayers of the said county under the said levy, is a trust for the use and benefit of your orator's said judgments.

Wherefore, in consideration of the premises, and inasmuch as your orator is remediless at law, and only relievable in a court of equity, he prays that each and every one of the taxpayers of the defendant, Allen County, for the year 1881 whose property was listed for taxation for revenue purposes with the assessor of the
13 said county for the said year be required and compelled to pay into this court, or unto some person to be appointed by this court as its receiver, the several sums due by them to the said Allen county on account of and by reason of the said special levy and tax of May 28th, 1881, as aforesaid, and that the same be applied to the payment of your orator's said judgments, interests, and costs, including the costs of collecting the said tax, and that each and every of the such payments made by the taxpayers of the said Allen county be in satisfaction and discharge of so much of the tax due by the taxpayer to said county under the special levy and tax aforesaid, and that the money arising therefrom be from time to time paid over to your orator and credited on his said judgments; and your orator further prays that the several taxpayers of the said Allen county, made defendants herein as aforesaid, be required and compelled to pay into this court herein with like effect the several sums due by them as aforesaid; and your orator prays judg-
14 ment for his costs herein, for the appointment of a receiver to collect the said taxes as aforesaid, and for all such other and further relief that may be necessary to enforce his said judgments or that the nature of the case may demand.

Therefore may it please the court to grant unto your orator subpœnas to be issued out of and under the seal of this court, and directed to the defendants, Allen County, Absolom Bailey, J. M. Bailey, T. W. and F. M. Burton, James A. Bright, Wm. Bailey, W. H. Brown, Sr., J. H. Gibson, T. R. Hughes, F. G. Mitchell, Sam'l J. Reed, A. J. Richey, T. J. Settle, Sr., A. S. Walker, P. W. Justice, E. C. Moore, John Banton, John Devesher, Jeremiah Horston, Simp-

son Moore, E. P. Neal, Sam'l Sears, Sam'l E. Hudson, James R. Cheney, A. H. Trovelstead, Wm. R. Downing, Ben. Downing, Sr., E. Preivitt, Wm. T. Devesher, John Dixon, and W. S. Porter, assignee of J. H. Page, commanding them and each of them, by a certain day and under a penalty therein to be named, to be and appear before this court, and then and there to answer the premises, and to stand to, obey, perform, and abide by all such orders, judgments, and decrees as may be made by this hon. court in the premises. And as in duty bound, &c.

W. O. & J. L. DODD,
Solicitors for Complainant.

Subpœna.

Upon which bill there issued the following subpœna in chancery, viz:

The President of the United States of America to Allen County, Absolum Bailey, J. M. Bailey, T. W. and F. M. Berton, James A. Bright, Wm. Bailey, W. H. Brown, Sr., J. H. Gibson, T. R. Hughes, F. G. Mitchell, Sam'l J. Reed, A. J. Richey, T. J. Settle, Sr., A. S. Walker, P. W. Justice, E. C. Moore, John Banton, John Devesher, Jeremiah Horston, Simpson Moore, E. P. Neal, Samuel Sears, Samuel E. Hudson, E. Preivitt, James R. Cheney, Wm. T. Devesher, A. H. Trovelstead, John Dixon, Wm. R. Downing, W. L. Porter, assignee of T. H. Page and Ben. Downing, Sr., Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in February next, to answer a bill in equity exhibited against you in our said court by T. W. Thompson, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 13th day of Dec'r, A. D. 1881, and in the 106 year of our Independence.

[SEAL.] Attest: SAMUEL B. CRAIL,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

Memorandum.—The defendants are to enter their appearance in the suit in the clerk's office on or before the 6th day of February next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

SAMUEL B. CRAIL, *Clerk,*
By HENRY F. CASSIN, *His Deputy.*

Upon which subpœna the marshal made the following return, viz:

Marshal's Return.

Executed this spa. in chy., Jan'y 13, 1882, on T. R. Hughes, F. G. Mitchell, T. J. Settle, Sr., & A. S. Walker, by delivering to each of them a true copy thereof, and on A. J. Richey, by leaving a
17 copy with Mrs. Alice Ducker, his daughter, & an adult member of his family, at his residence, all in Scottsville, Allen county. Feb'y 1st, executed on P. W. Justice, by leaving a copy with A. W. Justice, his son, and an adult member of his family, at his place of abode. Feb'y 2, executed on W. H. Brown, Samuel E. Hudson, Ben. Downing, and W. R. Downing, by delivering to each of them a copy as directed. Feb'y 3d, on W. T. Devasher—he not being found at his usual place of abode—by leaving a copy with Richard Devasher, his son, and an adult member of his family; on the County of Allen, by delivering a copy thereof to N. C. Pittsford, presiding judge of Allen county; on John Devasher & Jeremiah Horston, by delivering to each of them a copy thereof; on E. P. Neal—he not being found at his usual place of abode—by leaving a copy with Mrs. E. P. Neal, at his residence, she being his wife and an adult member of his family; on Simpson Moore, by leaving a copy with his son, R. E. Moore, and an adult member of his family, at his usual place of abode. Feb'y 4th, on Sam'l J. Reed, J. A. Bright, J. H. Gibson, and T. W. Burton, by delivering to each
18 of them a copy thereof; on F. M. Burton, by leaving a copy with T. W. Burton, his brother, an adult member of his family, at his usual place of abode, and on W. H. Briley, by leaving a copy with Mrs. W. H. Briley, his wife, an adult member of his family, all in Allen county, Ky. John Dixon, E. C. Moore, A. H. Trovelstead, James R. Cheney, B. Preivett, not executed. John Banton, J. M. Baily, & Absolom Bailey not found in the K'y district.

R. H. CRITTENDEN, *U. S. M.*,
By P. S. MORRIS, *D. M.*

Executed this spa. Jan. 25, 1882, on Sam. Sears by delivering to him a true copy thereof in Bowling, Green, Ky.

R. H. CRITTENDEN, *U. S. M.*,
By W. N. GRIDER, *D. M.*

Executed on W. L. Porter personally by delivering a copy thereof to him at Frankfort this 2d day of Feb'y, 1882.

R. H. CRITTENDEN, *U. S. Mar.*,
By A. B. CRITTENDEN, *D. M.*

And afterwards, on the 4th day of March, 1882, came the complainant, by his said counsel, and filed his amended bill herein, which is as follows:

19 *Amended Bill.*

Circuit Court of the United States, District of Kentucky.

T. W. THOMPSON *vs.* ALLEN COUNTY, &c.

Complainant, by leave of court, amends his bill herein, so as to

correct the same, in so far as it is therein stated that W. L. Porter is assignee of J. H. Page, and he charges that said W. L. Porter, as assignee of Elizabeth J. Page, sole devisee of J. H. Page, is indebted in the amount stated in the petition. He charges that said Porter is, by mistake, named in the original bill as assignee of J. H. Page, and he now asks to correct the same in that regard, and he now makes him defendant as assignee of Elizabeth J. Page, sole devisee of J. H. Page, and all of the allegations in said bill are now repeated as against said Porter, assignee as aforesaid.

Wherefore he prays as already prayed, &c.

W. O. & J. L. DODD, *For Pl'ff.*

And afterwards, on the 6th day of March, 1882, came the defendants, by Bijur & Davie, their counsel, and filed their answer
20 herein, which is as follows:

Answer.

Circuit Court of the United States, Sixth Circuit, Kentucky District.

J. W. THOMPSON
vs.
ALLEN COUNTY, &c. } Answer.

The defendants, Allen County, Absalom Bailey, J. M. Bailey, T. W. Burton, F. M. Burton, Jas. A. Bright, Wm. Briley, W. H. Brown, Sr., J. H. Gibson, T. R. Hughes, F. G. Mitchell, Samuel J. Reed, A. J. Richey, T. J. Settle, Sr., A. S. Walker, P. W. Justice, E. C. Moore, John Banton, John Devesher, Jeremiah Harston, Simpson Moore, E. P. Neal, Samuel Sears, Samuel E. Hudson, E. Preivitt, James R. Chanee, Wm. T. Devesher, A. H. Trovelstead, John Dixon, Wm. R. Downing, W. L. Porter, assignee, and Ben. Downing, Sr., for answer to the bill of complaint, say that it is true that the plaintiff recovered against the defendant, Allen County, on the 21st day of February, 1878, a judgment for $7,032.13, and interest, and $61.85 costs, and that said plaintiff also recovered against said county a further judgment for $15,155.90, with interest, and $88.26 costs, on
21 the 6th day of October, 1879, and that executions issued on said judgments, which were returned—no property found.

They deny that the said Allen county is a municipal corporation of the State of Kentucky, or is any corporation whatever; but say it is merely a geographical and political division of the State, with no powers or duties save those granted or imposed by the Legislature of Kentucky or its laws.

They deny that by the laws of Kentucky or otherwise it was the duty of the county court of Allen county to cause to be collected a tax upon all the taxable property situated in the said county of Allen, as listed under the revenue laws of Kentucky in a sum sufficient to pay the judgments aforesaid, and they deny that plaintiff demanded of said county court that it cause to be collected such sum.

They say that it is true that a mandamus was issued from this court against said county court, commanding them to levy said tax

and to elect a collector of taxes for said county, and the said
22 county court did, in obedience to said mandamus, make an order, whereby it ordered a levy of $2.08 on each one hundred dollars' worth of taxable property and fractional part thereof, situate in Allen county, as will appear from said order; and it is true that the said county court appointed J. T. Stork (who received the highest number of votes therefor) collector of said levy.

They deny that the said county court well knew, or knew at the time of his said appointment, that said Stork was hostile to the payment of said tax, or would not accept or qualify as such collector. They have not knowledge or information sufficient to form a belief as to whether on divers or on any occasions the citizens of said county have uttered threats of bodily harm to any person who will undertake the collection of the said tax. They say that it is true that the sentiments and feelings of a large majority of the citizens of said county are hostile to the payment of the bonds of said county in the petition described, but they say the cause of such hostility is that the said bonds were obtained by said railroad company
23 on false representations, and they were, with their interest, for an amount exceeding one-third of the value of the property in said county, and they amount to a practical confiscation of property in said county, and no value of any kind was ever received by said county therefor, nor was any railroad ever built in or near said county, as promised therefor.

They have no knowledge or information sufficient to form a belief as to whether a person can be found to act as such collector. They have no power to appoint any such collector.

They say that the calculations made by plaintiff in his petition as to the percentage which plaintiffs think ought to be apportioned against each of these defendants are the calculations of the plaintiff only, and were never made by any one authorized to make them by said county.

They deny that by virtue of the assessment and levy in the petition mentioned, or otherwise, the other defendants became or are indebted to defendant, Allen County, in the sums set out in
24 the petition, or in any sum whatever, or that such indebtedness is a trust for the use and benefit of the plaintiffs' said judgments; but, on the contrary, they say that the said order of levy was for a tax, and did not create a debt, but was without their consent, and they have never agreed to pay the same, and it is in no sense a "debt" or an "indebtedness," and there was never any trust created with regard to it of any kind for benefit of the plaintiff or otherwise.

They deny that in consideration of the premises the plaintiff is entitled to have this court cause the defendants, or any of said taxpayers, to submit to a collection of said taxes by this court; and they aver that this court has no jurisdiction or power to collect said taxes, and they say that by the laws of the State of Kentucky the said taxes can be collected by a collector of taxes for said county, and not otherwise.

Wherefore they pray that the petition herein be dismissed, and they pray for their costs, and for all proper and general relief.

BIJUR & DAVIE,
For Def'ts.

25 And afterwards, on the 25th day of April, 1882, eame the complainant, by his said counsel, and filed exceptions to the answer herein, which are as follows:

Exceptions to Answer of Defendants.

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

T. W. THOMPSON, Claimant, *vs.* ALLEN COUNTY, &c., Defendants.

Exceptions taken by the complainant to the joint answer of the defendants to his bill of complaint in this cause.

1. The complainant excepts to the entire answer of the defendants, because he is advised that the allegations of the said answer, as well as the denials therein contained, are insufficient in law to constitute any defense to complainant's bill of complaint, and are altogether evasive, imperfect, impertinent, and insufficient.

2. Without waiving the aforesaid general exception to the said answer as a whole, complainant further excepts specificially to the following portions of the said answer, because he is advised that they and each of them are immaterial, imperfect, impertinent, and insufficient, to wit:

a. "They deny that the said Allen county is a municipal
26 corporation of the State of Kentucky, or is any corporation whatever, but say it is merely a geographical and political division of the State, with no power or duties save those granted or imposed by the Legislature of Kentucky or its laws."

b. "They deny that by the laws of Kentucky or otherwise it was the duty of the county court of Allen county to cause to be collected a tax upon all the taxable property situated in the said county of Allen, as listed under the revenue laws of Kentucky, in a sum sufficient to pay the judgments aforesaid, and they deny that the plaintiff demanded of said county court that it cause to be collected such sum."

c. "But they say that the cause of the said hostility is that said bonds were obtained by the said railroad company on false representations, and they were, with their interest, for an amount exceeding one-third of the value of the property in said county, and they amount to a practical confiscation of property in said county, and no value of any kind was ever received by said county therefor, nor was any railroad ever built in or near said county, as promised therefor."

27 *d.* "They say that the calculations made by plaintiff in his petition as to the percentage which plaintiff thinks ought to be apportioned against each of these defendants, are the calculations

of the plaintiff only, and were never made by any one authorized to make them by the said county."

e. "They deny that by virtue of the assessment and levy in the petition mentioned, or otherwise, the other defendants became or are indebted to the defendant, Allen County, in the sums set out in the petition, or in any sums whatever, or that such indebtedness was a trust for the use and benefit of the plaintiff's said judgments; but, on the contrary, they say that the said order of levy was for a tax, and did not create a debt, but was without their consent, and they have never agreed to pay the same, and it is in no sense a 'debt' or an 'indebtedness,' and there was never any trust created with regard to it of any kind for the benefit of the plaintiff or otherwise."

f. "They deny that in consideration of the premises the plaintiff is entitled to have this court cause the defendants or any of said taxpayers to submit to a collection of said taxes by this court."

28 *g.* "They have no power to appoint any such collector."

h. "They aver that this court has no jurisdiction or power to collect said taxes, and they say that by the laws of the State of Kentucky the said taxes can be collected by a collector of taxes for said county, and not otherwise."

i. "The said answer is not verified."

In all of which particulars complainant is advised that the answer of the defendants is imperfect, impertinent, and insufficient.

Wherefore said complainant doth except thereto, and prays that the same be held to be impertinent and insufficient, and that the same be expunged, and that the defendants be compelled to put in a full and sufficient answer to complainant's bill, or to submit to a decree in accordance with the prayer thereof.

W. O. & J. L. DODD,
Solicitors for Complainant.

And afterwards, on the 5th day of June, 1882, came the parties, by their counsel, and filed their stipulation herein, which is as follows:

29 *Stipulation.*

United States Circuit Court, District of Kentucky.

T. W. THOMPSON *vs.* ALLEN COUNTY, &c.

By leave of the court the parties now stipulate of record in this cause—

1. That the county court of Allen Co. has in good faith and diligently endeavored to find a fit and proper person to act as collector of the railroad taxes in said county, and of the special levies of taxes in the bill of complaint set forth.

2. That no such fit and proper person can be found who will undertake and perform the office and duty of such collector.

3. That the complainant is without remedy for the collection of its debt herein, except through the aid of this court in the appoint-

ment of a receiver, as prayed for in the bill, or other appropriate orders of the court.

W. O. & J. L. DODD,
Counsel for Compl't.
BROWN & DAVIE,
Counsel for Def'ts.

30 *Decree.*

And afterwards, on the 27th day of September, 1882, this cause having been heard and submitted on the pleadings, exceptions, and stipulation, and the court being fully advised thereof, the court, by the presiding justice, filed its opinion herein, and it is ordered, adjudged, and decreed that the bill of complaint herein be, and the same is hereby, dismissed, and that the defendants go hence without day and recover of the complainant their costs herein expended; to which the complainant excepts, and prays an appeal to the Supreme Court of the United States, which is granted him.

The opinion above referred to is as follows:

Opinion.

United States Circuit Court, District of Kentucky. In Equity.

T. W. THOMPSON, Complainant, *vs.* ALLEN COUNTY *et al.*, Defendants.

The complainant has an unsatisfied judgment rendered in this court against the defendant upon coupons, representing interest upon bonds issued by the county in aid of a projected railroad. A
31 special tax to pay this judgment has been levied in pursuance of a mandamus. The statute authorizing the tax provides that it shall be collected by a collector appointed for that purpose by the county court. In answer to a mandamus requiring the appointment of such a collector, it is returned that no suitable person can be found who is willing to accept the appointment, and it is admitted that the county court has in good faith diligently endeavored to find one, and that no one can be found who is willing to qualify as such collector.

The present bill in equity is filed to obtain relief by the collection of these taxes and their application to the payment of the complainant's judgment through a receiver or other agency of the court.

The ground of this resort to equitable relief is, that the remedy provided by law is inadequate and has failed, and that the levy and assessment of the taxes has created a fund which constitutes a trust to be administered by a court of equity.

The precise question thus presented was left undecided by the Supreme Court in the case of Meriweather *v.* Garrett, 102 U. S.,
32 472. In the conclusions of the court, as announced by the Chief Justice, it is said: "Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no

public officer charged with authority from the Legislature to perform that duty, is not decided, as the case does not require it."

It may, perhaps, be equally true that the case has not in fact arisen here; for although it is to be assumed that no collector has been or can be appointed, yet the reason is not that there is no such officer provided for by law, but because no person is willing to accept an appointment and perform its duties.

The failure of the remedy is, therefore, merely casual, and not necessary; and in contemplation of law there is an officer charged with the duty which a court of equity is asked to assume because there is no such officer.

But if the question was left open by the decision referred to, I am constrained to conclude that it is decided by the spirit and logic of that case. The collection of a public tax as much belongs
33 to the authority of the State as its levy and assessment, and the reasons which forbid a court to supply the latter apply with equal force to the former. The tax when assessed is not a fund which can be dealt with by a court as an equitable asset, or a chose in action, subject to an implied trust. The levy and assessment is a step in the process, of which the collection is another, and that proceeding is the only agency known to the law by which the desired result can be effected. The jurisdiction of this court is confined to compelling the State officers to perform their duty under the State laws, and no substitute can be invented.

The bill consequently must be dismissed.

STANLEY MATTHEWS,
Associate Justice.

UNITED STATES OF AMERICA, *District of Kentucky:*

At a circuit court of the United States, begun and held at Louisville, for the district of Kentucky, on the 20th day of Febru-
34 ary, in the year of our Lord one thousand eight hundred and eighty-two, and in the one hundred and sixth year of American Independence.

Present: The Honorable Stanley Matthews and John Baxter, judges.

Certificate of Division.

T. W. THOMPSON, Complainant, *vs.* ALLEN COUNTY *et al.*, Defendants

This case coming on to be argued at this term on the bill of complaint, answer, exceptions, and stipulation, it occurred as questions—

1st. Whether taxes levied under judicial direction can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the Legislature to perform that duty.

2d. Whether taxes levied by State officers under judicial direction can be collected through a receiver appointed by a United States circuit court in equity, where the Legislature has provided an officer to collect them, but there is a vacancy in the office, and no one can be found who is willing to accept the office.

35 3d. Whether a court of chancery can grant any relief to complainant upon the facts recited in the bill, answer, and stipulation, as presented by this record.

On which three questions the opinions of the said judges were opposed.

Whereupon on a motion of the complainant by his counsel that the points on which the disagreement hath happened may during the term be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided:

It is ordered that the foregoing questions, together with the bill, answer, exceptions, and stipulations, be certified according to the request of complainant, by his counsel, and the law in that case made and provided.

STANLEY MATTHEWS,
Associate Justice.
JNO. BAXTER,
Circuit Judge, &c.

DISTRICT OF KENTUCKY:

36 I, Samuel B. Crail, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 36 pages (this included) contain a true and complete transcript of the record of the proceedings had in the court in the cause mentioned in the caption hereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 30th day of September, A. D. 1882.

[SEAL.] SAM'L B. CRAIL, *Clerk.*

Endorsed on cover: Kentucky C. C. U. S. No. 326. T. W. Thompson, appellant, *vs.* Allen County *et al.* Filed 9th October, 1882.

115-560

SUPREME COURT U. S.
FILED.
OCT 12 1885
JAMES H. McKENNEY,
CLERK.

APPELLANTS BRIEF.

Supreme Court of United States.

OCTOBER TERM, 1885.

No. 60.

T. W. THOMPSON, *Appellant,*

v.

ALLEN COUNTY, *et al.*, *Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF KENTUCKY.

W. O. DODD,
CHAS. EGINTON,
Counsel for Appellant.

L. D. CRONINGER PRINT, COVINGTON, KY.

No. 60.

Supreme Court of United States.

T. W. THOMPSON, *Appellant,*

v. } *Appeal.*

ALLEN COUNTY, *et al.*, *Appellee.*

BRIEF FOR APPELLANT.

I.

STATEMENT.

Appellant had judgments for over twenty thousand dollars in the United States Circuit Court at Louisville, Kentucky, against the appellee, Allen County. Executions were issued and returned "no property."

Those judgments were rendered in 1878–9, upon past due coupons, cut from bonds issued by the appellee county, after a favorable vote thereon, by the citizens thereof, to assist the Cumberland and Ohio Railroad Company, in building a Railroad from Louisville, Kentucky, through Allen County, to a designated point on the Tennessee line.

The law authorizing the issue of these bonds was passed in 1869, and authorized and required the County Court of Allen to annually levy and collect a tax upon the taxable property in the county as listed and taxed under the revenue laws of the State, sufficient to pay accruing interest, with cost of collecting, and eventually the principal of the bonds.

It was also declared therein that the county court may appoint a collector of said railroad tax, or may require the sheriff of the county to collect said tax, and be responsible therefor, on his official bond; *said tax, when levied, to be a lien on all the personal and real estate in the county of the person taxed;* sales for non-payment to be made.

For some years after the bonds were issued the Sheriff was required to collect the railroad taxes, but in 1876, the Legislature passed a Special Act, declaring the Sheriff relieved from giving bond and from liability on his official bond for railroad taxes, which operated as intended, and he was not thereafter required to collect. Up to the passage of that Special Act, no effort had even been made to appoint a special Collector of railroad taxes, and the same non-acting course continued for five years longer.

The county court, although requested to levy, appoint a collector, and collect, failed to do so, *but in 1881 they assembled, and in obedience to a mandamus from the United States Court, made a levy*, and elected a person to collect; the court at the time knowing he would not accept, and that a large majority of the citizens of the county were hostile to paying the tax, and their threats prevented said court from obtaining one to accept

the appointment of collector, and no one has been found who will accept.

Appellant thereupon filed his bill of complaint against Allen County, and the tax payers thereof, a large number of them by name, setting up his judgments and return of "no property" upon execution, official copy of county Court proceedings, tax assessment of 1881, which amounted to the sum of one million and forty odd thousand dollars, the assessment and levy made against each citizen, claiming the same as a trust fund in his favor, asking that it may be paid into court, for the appointment of a Receiver, etc., and for all proper relief, etc.

Process was duly executed, and defendants answered.

They deny—

That Allen County is a municipal corporation, or is any corporation whatever, is merely a geographical and political division of the State, with no other powers or duties save those granted or imposed by the Legislature or laws of Kentucky.

Deny—

That by the laws of Kentucky, or otherwise, it was the duty of the County Court of Allen County to collect a tax as alleged by complainant.

Admit—

That a mandamus issued from the Court against the County Court, commanding them to levy said tax and to elect a Collector of taxes, and *that the Court in obedience to said order did make a levy of $2.08 on each one hundred dollars worth of taxable property and fractional part thereof in Allen County*, and appointed J. T. Stark (who received the highest number of votes therefor) Collector of said levy.

Deny—

That the Court knew Stark was hostile to the tax—but admit that the feelings of a large majority of the people of the county are hostile to the payment of the tax. Do not know as to whether a person can be found to accept as Collector.

Assert—

They have no power to appoint a Collector.

Deny—

That by the alleged assessment and levy the other defendants became or are indebted to Allen County, in the sums set out in the petition, or in any other sum; or that such indebtedness is a trust as alleged for use of complainant, and that their order created a debt.

Deny—

That complainant is entitled to relief prayed for, and insist that said tax by the laws of Kentucky can be collected by a collector of taxes for said county and not otherwise.

The complainant, pages 10 and 11, except to the entire answer of defendants; and also specifically to each item or portion thereof—deny the contra allegations of the defendants—re-affirm the allegations of the petition, and state that the answer is not verified, is imperfect and insufficient, and pray it may be so held.

THAT UNVERIFIED ANSWER

Is *confessedly* untrue in the following particulars:

1. Allen County is (at least) certainly a *quasi* corporation, with powers granted and duties imposed and required by the sovereign, the Legislature of Kentucky.

2. It was the required, imperative duty of the County Court of Allen County to cause to be collected a tax upon all the taxable property in the county sufficient to pay complainant's judgment.

3. The complainant did demand of said County Court the collection of the tax to pay his judgment.

4. Said County Court did not "*appoint*," they merely *elected* J. T. Stark collector, who refused to accept and never gave bond.

5. The bonds issued by the county were not obtained by the railroad company upon false representation, and no such or any other objection has ever or could properly be made against the validity of the bonds. Complainant's judgments prove they are justly in full force.

6. Said County Court had positive knowledge that they could not find a suitable person who would act as collector.

7. They did have power—explicit, positive power, to appoint such collector.

The unfairness of said answer is fully established by the agreed facts and admissions of the defendants in the recorded *stipulation* on page 11 of the Record, made June 5, 1882, and which is here copied *verbatim*.

STIPULATION.

By leave of the Court the parties now stipulate of Record in this cause:

1. That the County Court of Allen County has in good faith

and diligently endeavored to find a fit and proper person to act as collector of the railroad taxes, in said county, and of the special levies of taxes in the bill of complaint set forth.

2. That no such fit and proper person can be found who will undertake and perform the office and duty of such collector.

3. That the complainant is without remedy, for the collection of its debt herein, except through the aid of this Court in the appointment of a Receiver, as prayed for in the bill, or other appropriate order of the Court.

And afterwards, September 27, 1882, this cause was submitted on the pleadings, exceptions and stipulations, presiding justice filed his opinion, bill of complaint dismissed and appeal granted. Page 12, 13 and 14 of Record.

The opinion of his Hon. Associate Justice Matthews—

Referred to complainant's unsatisfied judgments rendered upon coupons representing interest upon bonds issued by the county to aid a projected railroad, the statute authorizing the tax, provides it shall be collected by a collector appointed for that purpose by the Court, in answer to a mandamus, it is returned that no suitable person can be found willing to accept, and that it was admitted, the County Court in good faith had endeavored to find one, but could not. Bill was filed to obtain relief, by the collector of the taxes, and payment through a Receiver or other agency of the Court.

Complainant sought relief in equity because remedy by law is inadequate and has failed, that the assessment and levy of the taxes has created a trust fund, to be administered by a court of equity; precise questions thus raised was left undecided in *Meriwether* v. *Garrett*, 102 U. S., and in fact has not arisen here, for although it is to be assumed that no collector has been or can

be appointed, yet it is not because there is no such officer appointed by law, but no one is willing to accept; failure of remedy is therefore merely casual, not necessary, and in contemplation of law there is an officer charged with the duty which a court of equity is asked to assume because there is no such officer.

Decides—

Collection of the tax belongs as much to the State as its assessment and levy, and the Court is as much forbid to do the latter as the former. Tax, when assessed, is not a fund to be dealt with as an equitable asset; jurisdiction of the Court is confined to compelling State officers to perform their duty under State laws, and no substitute can be invented.

Certificate of division was signed by the Associate Justice and Hon. John Baxter, Circuit Judge, and ordered to be certified that the following questions occurred—

1. Whether taxes levied under judicial direction can be collected through a receiver appointed by the Court of Chancery, if there is no public officer with authority from the Legislature to perform the duty.

2. Whether taxes levied by State officers under judicial direction can be collected through a receiver appointed by the U. S. Court, where the Legislature has provided an officer to collect, but there is a vacancy in office and no one can be found who is willing to accept the office.

3. Whether a Court of Chancery can grant any relief to complainant upon the facts recited in the bill, answer and stipulation, as presented in this Record.

On which three questions the opinions of the said Judges were opposed.

With all deference to the Hon. Associate Justice, it is suggested that the Legislature did not imperatively declare the tax "*shall*" be collected by a collector; by reference to page 11 hereof it will be seen statute reads: County Court *may* appoint a collector, or *may* require the sheriff of the county to collect the tax. The sheriff at first was required and did collect said tax; subsequently the Legislature declared him released. No collector ever was appointed, but in 1881, under a pressure, they elected a person who would not accept, the only one ever elected. No collector has ever had an existence in Allen County except the sheriff, and the Legislature in 1876 declared him released from duty, and he immediately ceased to act—did this by an act the Governor did not approve; the attention of his Honor was not called to that action of the State in thus preventing the collection of the taxes, nor to the fact that the statute authorizing the bonds created a lien in their favor.

II.

ASSIGNMENT OF ERRORS.

The decree herein is erroneous as follows:

1. In dismissing complainant's bill.

2. In not decreeing him "relief by the collection of the taxes, specialy levied in 1881, and their application to the payment of his judgments, through a receiver or other agency of the court."

3. In not regarding "the said special levy and assessment as creating a fund, constituting a trust to be administered by a Court of Equity."

4. After recognizing the fact "*that no Tax Collector has been or can be appointed for Allen County,*" nevertheless to erroneously declare "that in contemplation of law there is such an officer, charged with the duty of collecting taxes of that County."

Upon the contra thereof, the law never did any more than merely declare, in 1869 and 1876, that the County Court of said County "*may create such an office,*" and now, when the appointing power, after the lapse of thirteen years, solemnly announces that it has not been able to find a proper person to undertake the duties of special collector, and that Allen County has not (in fact, never did have) a special tax collector, it is erroneous to decree that the law considers there is an officer in said County charged with the duties of Tax Collector.

5. The alleged failure of the remedy for complainant by and through a Tax Collector, appointed by the County Court, is not, as per said decree, "*merely casual,*" but is purposely, as intended, and according to the plain facts and attendant circumstances in this case, past and present, will continuously remain unchanged, and be of never ending duration, and it was error in not so regarding it.

6. When, as in this case, appellees assume there is no collecting officer, and no proper person can be found to act,—and they also voluntarily admit on the record that the appellant is without remedy for the collection of his judgment, except through the aid of the

United States Court,—it is error in not granting the desired relief, to insure the payment or collection of the tax.

7. The decree herein is erroneous, in not decreeing that the taxes levied by the County Court of Allen County, Kentucky, May 28th, 1881, as mentioned in bill of complaint herein, to pay the judgments therein named, is a lien on the real and personal estate of the persons taxed, is an equitable right in favor of the complainant, enforcible in equity, and should have been enforced by proper orders herein of the United States Court, in equity, and appellant's judgments satisfied.

8. It was error, in not specifically decreeing that the tax levy referred to in the bill of complaint herein, and mentioned in the *order* of the *Allen County Court*, Kentucky, of May 28th, 1881, was a good and valid levy, legal and of binding force and effect.

9. It was error, in not decreeing that taxes levied under judicial direction (as done in this case) can be collected through a receiver, appointed by a Court of Chancery, if there is no other public officer charged with authority from the Legislature to perform that duty.

10. It was error, in not decreeing that taxes levied under judicial direction can be collected through a receiver appointed by the United States Court, in equity, where the Legislature has provided an officer to collect them, but there is a vacancy in the office and no one can be found who is willing to accept the office.

11. It was error, because appellant was not de-

creed the relief desired in his bill of complaint, and because he was not granted the relief desired by him, upon the facts stated in the bill, answer and stipulation in this record.

III.

ARGUMENT.

The Legislature of Kentucky desired the construction of the aforesaid railroad, and by an act approved February 24, 1869, vol. 1, p. 463, empowered said Cumberland and Ohio Railroad Company to build it.

By the fifteenth section of said charter it was provided "That any city, town, or county through which said proposed road shall pass is hereby authorized to subscribe stock in said railroad company in any amount any such city, town, or county may desire," and the County Court was authorized to issue and sell bonds of the county in amount sufficient to pay for the stock so subscribed. It was further provided by said section that "the County Court having jurisdiction in any such county that may subscribe for stock in said railroad company is hereby authorized and required to levy annually, and collect, a tax upon the taxable property in their county, as listed and taxed under the revenue laws of this State, a sum sufficient to pay the interest on said bonds as it accrues, together with the costs of collecting the same;" and also to levy and collect a tax to pay the principal of the bonds. By the same section it was further provided that "the county court of any county having jurisdiction may appoint collectors for said tax, or may require the sheriffs of the respective counties within the jurisdiction of the same to collect said tax; all of whom shall *have the same powers and remedies, and shall proceed in the same* way for the collection of said tax as the sheriffs in the collection of the State reve-

nue." It also provides for the time when the sheriff shall pay over the taxes so collected and his rate of commission thereon.

Acts of 1869, vol. 1, pp. 471, 472.

The Legislature subsequently amended said act of 1869, by an amendment approved March 11, 1870, Session Acts 1869–70, vol. 2, pp. 228 and 231, wherein it is declared:

Section 10. That the sheriff or other officer having in their hands for collection taxes levied under said original act or this amendment, shall use all the remedies and exercise all the powers of distraining and selling personal property, which sheriffs are authorized to do in the collection of the State revenue; and when such officer shall be unable to find personal property liable to sale for unpaid taxes of any individual, he may levy the same on any real estate of said person in the county, and sell the same, under the same regulations prescribed by law for selling real estate under execution, *and all such taxes shall be a lien on the real and personal estate of the person taxed, which shall be in the county in which such taxes are levied*, but the owner may redeem the same within five years by paying the purchase money, with ten per centum per annum interest, and all taxes of every description paid by the purchaser.

Sec. 16. That all taxes levied under this act, and the one to which this is an amendment, shall be due and payable at the same time the State revenue is payable.

Sec. 17. This act shall take effect from its passage.

Approved March 11, 1870.

Six years after the passage of the aforesaid amended act, the Legislature, in 1876, (about February 14, 1876,) in vol. 1, p. 207, declared the following act passed without the approval of the Governor. Chap. 169:

An Act to release the Sheriff of Allen County from collecting Railroad taxes, and for other purposes.

Section 1. That hereafter the Sheriff of Allen County shall not be required to give bond for the collection of any levy or tax in said county for the purpose of paying the principal or interest on the county bonds of said county issued for railroad purposes, and shall not be held responsible in his official bond for the same.

Sec. 2. That the County Court shall, at the instance or motion of any person, or by request, appoint a special Collector to collect all taxes or levies in said county for railroad purposes, and shall require bonds, with security, to be approved by the court, for the faithful discharge of all duties incumbent on him.

Sec. 3. All laws in conflict with this are hereby repealed.

Sec. 4. This act to take effect from its passage.

Became a law by reason of not being returned by the Governor within ten days.

And should have been called *a bill to prevent the collection of railroad taxes in Allen County.*

The aforesaid original act required that before any stock was subscribed the question should be submitted to a popular vote, which as to Allen County was done, and the required assent given; thereupon that county issued her bonds, equal in amount to the stock subscribed, delivered them in payment of her subscription to the railroad company, and in their proper use a large amount in value came to the appellant, who was compelled, the county failing to pay interest, to sue upon past due coupons, and obtain the aforesaid judgments.

It is thus seen that at the time of the issuing and delivery of said bonds to the railroad company, and their paying them out for materials and labor, the law of Kentucky as it then stood in said original act of '69, and the amended act of 1870, required the County Court

of Allen County, to levy a sufficient tax, from time to time, to pay the bond interest as it fell due, and eventually the principal; authorized the County Court *to require* the sheriff of the county to collect and properly account for the tax, making him and his sureties liable therefor. The statute also declared all such taxes when levied to be a lien on the estate of the person taxed. The parties, therefore, to whom the bonds were offered, could not reasonably doubt their being good, and that the County Court would levy and "require the sheriff," and that he would collect the tax and pay the interest. This feeling prevailed and the bonds were readily disposed of; the unfortunate holders, however, soon found, to their sorrow, that the County Court was a slow moving, non-acting body, and paying taxes was not as pleasurable to the people of the county as voting thereon, nor did they feel the same outburst of pride, at the return of the little coupons, as when they looked with delighted, dilated eyes upon their county officials signing and sealing the beautifully printed promises of Allen County to pay to the holder the amount that was emblazoned in golden letters upon the face of the precious, proud emblem, that attested Allen County's wealth and importance.

It is not pleasurable in referring to this item in the history of this case, to be compelled to state that the Legislature of the same State that passed the aforesaid act of 1869, with its seductive, persuasive provisions that no less an officer than the High Sheriff of the county could be required to collect from the people the wherewith to pay accruing interest, and at the end of twenty years the principal of the bonds,—that the Legislature of the same State that passed the aforesaid satisfactory provisions, those deceptive inducements, should,

after the contractor and day-laborer had been induced to rely upon the said 15th and 10th sections as permanent law, so far disregard the plain, positive principle of even-handed justice, nine years afterwards at the session of 1876, to pass the special, illegal act hereinbefore mentioned—"That hereafter the sheriff of Allen County shall not be required to give bond for the collection of railroad taxes in Allen county"—(see same, *ante* page 13.) It was effective in keeping the sheriff from being required to collect, and from collecting.

The deceived holder of the aforesaid bonds, whether contractor, laborer, or purchaser, could not mistake the intent and effect of that special act. The procurers, nor the Legislature by the second section, did not thereby cover the disgrace, or conceal the fraud intended by the first section.

No person entitled to be called "collector," or charged with the duty of collecting railroad taxes, has been appointed in Allen County,—the sheriff had been required, did collect, but was thrust aside, evidently to prevent any further collection, and, as before suggested, years pass by, the County Court made one effort, that was eminently successful in *not* appointing,—no one ever was appointed, consequently.

ALLEN COUNTY HAS NO COLLECTOR.

Counsel for appellees contend that there *is* a public officer charged with authority to collect the taxes. That the *power* given to the County Court to appoint a collector is equivalent to the person when appointed. It is difficult to argue this point seriously. A mere naked power to create, without exercising the power, can not be the equivalent of creature. Where is the officer?

What is his name and when appointed? No such person is here claiming the right to collect.

In the Memphis case, Meriwether was appointed and accepted the trust and claimed the right to collect. If he had refused to accept the trust and no other person had been willing to qualify, it would have been this case. Meriwether was the appellant in that case. It may be that counsel's argument is based on the idea that equity considers that as done which *ought* to be done.

The stipulation of counsel, *supra*, is an answer to any thing that may be said on this subject; especially the alleged inability of the County Court to obtain a proper person to perform the duties of collection, makes it certainly look as if Allen County had no kind of an officer to collect railroad taxes; if, however, "*in contemplation of law there is an officer there charged with the duties of collector*," it is altogether reasonable to inquire who it is that the law has in its eye—or who is it that the eye of the law is contemplating or looking at; it can not be the sheriff, for the act of 1876 has relieved and hid him from view—and certainly it is not Mr. Stork, for he would not accept, nor can it be any one with a local habitation, for the County Court has emphatically announced they could not, have not, been able to find any one that would be a collector. There is an old saying that a rose may be without a name, but it never has been even suggested that there can be a name without a rose.

There is another truism,—"that the looker-on can see as far into the mill stone as the man that pecks it," but the law it is claimed can go deeper and further than either of them, seeing what is not, just as plain as what is, and yet if it can see the remotest shadow of a real

bona fide collector of railroad tax in Allen County, it must be blessed with more than double seeing power, aided by treble superexcellent magnifying glasses, giving active, moving life to airy nothingness, and investing it with all the proprieties of a courteous official gentleman, but most assuredly he is without name, shape or form, and is not visible to the keenest and brightest human vision; the County Court during the long period of six years had never seen him, and during that time he had never called on the people in person, or by proclamation, in regard to taxes, and it is their earnest prayer and determined purpose that he shall never have a more substantial real existence in all time to come than he now has.

ASSESSMENT AND LEVY.

The defense comments and quotes against the right of the United States Court to assess and levy taxes. It is not necessary to respond thereto, because herein the Court has not done either.

The estate in the County of Allen had been assessed by the regular State officer, the County Court was derelict in not making a levy thereon to pay the railroad interest in appellant's judgments, and the United States Court under a proper proceeding reminded the County Court of its duty, and they, the County Court, in accordance with the State Statute made a levy of $2.08 on each one hundred dollars' worth of taxable property, in said county. The United States Court did not make the levy,—the county officials did it, and in doing so merely performed the duty enjoined upon and required of them, by the Act of 1869 (*ante p.* 11).

Dillon, Section 687, says:

Where a law under which the tax is created provides for the levy of a special tax to pay it, this duty will be enforced by mandamus.

The law of Kentucky as to mandamus and its use, etc., is defined in the Code of that State, as follows:

(Sec. 474, Code of Practice.)

Except those used by a Court for enforcing its judgments on Orders, shall be obtained by motion.

(Sec. 477.)

It is an Order of a Court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law, and is granted on the motion of the party aggrieved.

The course thus indicated was strictly pursued, and was the same authorized by *Van Hoffman* v. *City of Quincy*, 7 Wallace, p. 535.

TAX LAWFULLY LEVIED AND A LIEN.

In *Heine* v. *Levee Commissioners*, 19 Wallace, 655:

Associate Justice Miller commences the Opinion by declaring: It has been decided in numerous cases, founded on the refusal to pay corporate bonds, that the appropriate proceeding was to sue at law, and by a judgment of the Court, establish the validity of the claim and the amount due, and by the return of an ordinary execution, No property found to satisfy the judgment, then if the corporation had authority to levy and collect taxes for the payment of that debt, a mandamus would issue to compel them to raise by taxation the amount necessary to satisfy the debt.

In this case appellant held such a claim, established its validity by a judgment at law, issued execution, which was returned "no property." The appellee County Court had authority to levy and collect taxes to satisfy his debt, which, although requested, they failed to do, and then under a mandamus from the Court that rendered the said judgment, said County Court assembled and levied a tax to satisfy appellant's debt upon the real and personal estate in the county, the doing of all which was strictly and fully in conformity with the foregoing opinion, as clearly apparent in this record. The taxes thus levied, it is declared in the statute authorizing their assessment, "shall be a lien on the real and personal estate of the person taxed." See statute, *supra*, p. 12.

The State, as heretofore suggested, desired that the road in question should be built, and by the aforesaid statute of 1869, and amendment of 1870, provided for the issue of bonds, and to insure realization therefrom authorized taxes to be assessed, levied and collected; to do which the quasi corporation created in connection therewith, was especially empowered to levy and appoint a special collector, or require the sheriff of the county to make the collection, his fidelity being assured by his official bond. A further security was also tendered by giving the bond-holder a *lien on the tax payer's estate.* Those provisions were considerations that entered into the contract between the State, the makers and the takers of the bonds—that induced their being taken, and then after the holder parted with value therefor, the State, without consent, releases the sheriff and he ceases to collect, and the County Court declares it can not find a proper person to act as collector. The deceived bond-holder thus deprived of every other reliance, by the

parties with whom he contracted, must, *ex necessitate*, turn to his lien security, the equity that was to be a present help in time of need, and claim for and by it all that was promised when he gave his labor or his means in exchange for it. He therefore, by this proceeding, claims that lien security,—claims that it shall be enforced as an *Equitable Right*, which under the foregoing facts gives him the privilege of entering within the gates of the Equity Court, receiving therein the justice and protection to which he is entitled. If this is not accorded to him, then the promises made and considerations that influenced him to become a party to said contract, are no more than "sounding brass or a tinkling cymbal," and that which he was made to believe was a sure reliance, is no more than a rope of sand.

But appellant being within the equity arena, prays that he may not, by technicality or otherwise, be thrown out, and coldly told that his only reliance is on the County Court, that made one trial in thirteen years to obtain a special collector, and offers that one effort as evidence of diligence, good faith and ability; much less should he be forced into relying on the State, that authorized the imposition of taxes for a special purpose, and declared its principal officer in the county might be required to collect them, and then when that officer was acting, went back upon all that it had previously done, released the officer mainly relied on, and he is entirely off from the aforesaid specific duty, and said State is willing that the people of the county—their County Court and the State itself—shall abide in disgraceful discredit. From such a calamitous ending, as to his claim, appellant most fervently prays to be delivered.

The question plainly presented by this record is, whether a tax levied under judical directions for the payment of judgments of this Court can be collected by the process of the Court, either through a receiver or otherwise, where there is no public officer charged with authority to collect the same? By the stipulation *supra* it is conceded that the complainant is without remedy unless this court can give relief.

The precise question was left open by the Supreme Court in *Meriwether* v. *Garrett*, 102 U. S. 472. In the conclusions of the Court as announced by the Chief Justice it is said,

> Whether taxes levied in obedience to contract obligations or under judicial direction can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it.

We concede, as settled by that case, that taxes levied generally can not be collected through the instrumentality of a court of chancery.

The peculiarity of the decision in *Meriwether* v. *Garrett* has led to great confusion. We think that case settled that taxes levied for general purposes can only be collected in such way as the Legislature may direct; and that in cases of special levies to pay contract obligations, or those made under judicial direction, if there be a public officer charged with authority from the Legislature to perform that duty, he alone must collect them; but in the absence of such public officer charged with the duty of collection, it is not decided whether the Court has power to collect taxes levied to pay contract obligations or such as are levied under

judicial direction. In that case the Circuit Court appointed a receiver to collect all the taxes which had been levied. And in the eighth conclusion of the Supreme Court we find this direction:

> If on the settlement of the accounts of the receiver herein it shall be found he has any money in his hands collected on taxes levied under judicial direction to pay judgments in favor of any persons who have become parties to this suit, an order may be made directing its appropriation to the payment of such judgment.

And the only reason given for the reversal of so much of the judgment as appointed a receiver to collect taxes levied under judicial direction, was that the back-tax collector appointed under legislative authority was a public officer, and charged with authority to collect all the taxes levied before the repeal of the charter.

In the absence, therefore, of controlling authority, we contend that upon reason and analogy the complainant is entitled to the relief he seeks.

The agents appointed by the State for such purposes having levied the tax, the sovereign act has been performed. The amount due by each individual taxpayer is fixed by the levy. The amount so due by the individual taxpayer is a lien obligation on the part of the citizen to the county. It was the duty of the officers making the levy to appoint some suitable person to collect the tax so levied, and to require of him a bond for the faithful discharge of duty. No such person will accept the office or qualify as collector. The common-law remedies have been exhausted, and we now ask this court for relief.

What relief is complainant entitled to?

We answer in the language of the Supreme Court:

> Such relief as is consistent with the general law of the land,

and authorized by the principles and practices of the courts of equity, will under such circumstances be administered.

Heine v. *The Levee Commissioners*, 19 Wall. 658.

What principles and practices are authorized by courts of equity? For the present we say:

Allen County is a municipal corporation. It was created primarily for public or governmental purposes. In its public capacity it was and is subject to the control of the State. It was also endowed with powers to be exercised for the benefit and convenience of its own citizens—namely, to take stock in a railroad company and to issue its bonds in payment therefor. The State did not compel the exercise of this power, but left it to the wish of the majority of the corporators. In this character it does not differ in any substantial degree from the private corporations which the State charters.

It therefore has a dual capacity. The one it exercises only for governmental purposes; the other exercises for the benefit or convenience of its own citizens; and in this latter capacity the State is only concerned incidentally, as it is with the action of private corporations. This distinction is well recognized in Kentucky.

Claxton's adm'r v. *Lexington & Big Sandy R. R. Co.*, 13 Bush, 638.

In that case the corporation was authorized to construct and operate a railway; also to own real estate, and to mine coal and other minerals. In the operation of the mining business an accident occurred, and suit for damages was instituted under a statutory provisions concerning railroads, and the Court held that such corporation can not, in the exercise of one of those powers, be

held liable for statutory damages against corporations which exercise the other power.

In *San Francisco Gas Co.* v. *San Francisco*, 9 Cal. 453, it was held that in providing light for corporate conveniences, a municipal corporation is on the same footing with a private corporation.

In *Board of Park Commissioners* v. *Common Council of Detroit*, 28 Mich. 238, the distinction is drawn with great clearness between those powers which are given to municipal corporations for the private interest of its corporators and those which are public.

In *Western Saving Fund Society* v. *Philadelphia*, 31 Pa. St. 183, where the municipal body was the owner of the gas works, the court held that

> It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred.

In subscribing for stock in a railroad company and issuing bonds to pay for the subscription, the county was not acting in its governmental capacity. It was for the local convenience and benefit of its citizens, like water, light, parks, etc., in which it acted in its *quasi* private capacity, and was for the exclusive benefit of its corporators.

Bailey v. *New York*, 3 Hill, 531;
Oliver v. *Worcester*, 102 Mass. 489;
Cooley on Taxation, 482.

In its public capacity the State has absolute control; over its private obligations it has not.

The moneys to be raised here to meet the principal

and interest on bonds are in no sense public revenue. The object and purpose of the tax, as well as the powers authorizing it, are private. In respect to the powers conferred by these laws, Allen County is to be regarded as a private corporation, standing upon the same footing as an individual or body of persons upon whom like powers had been conferred.

The grant of power to the county, when exercised, became a contract which can not be impaired.

Von Hoffman v. *City of Quincy*, 4 Wall. 535.

Here the tax has been levied. Its collection is purely a ministerial act.

These taxes are set apart for a specific purpose and can not be used for any other. The order directing the levy specified to whom the taxes should be paid when collected. A trust was therefore created. The county, as such, has no beneficial interest in the matter. It is the trustee, and complainant is *cestui que trust*.

In *Meriwether* v. *Garrett*, *supra*, in the fifth conclusion, the Court said:

> The funds collected by him (receiver) from taxes levied under judicial direction can not be appropriated to any other uses than those for which they were raised.
>
> Where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given can not be withdrawn until the contract is satisfied. The State and the corporation in each case are equally bound. The power given becomes a *trust* which the donor can not annul, and which the donee is bound to execute.

Von Hoffman v. *City of Quincy*, 4 Wall. 554.

Where the trustee is a corporation, no modification of its franchises or change in its name, while its identity remains, can affect its rights to hold property devised to it for any purpose. Nor can a valid vested estate in trust lapse or become forfeited by any misconduct in the trustee or inability in the corporation to execute it, if such existed. . . . If the trust be not rightly administered, the *cestui que trust*, or the sovereign, may require the courts to compel a proper execution.

Girard v. *Philadelphia*, 7 Wall. 14.

A municipal corporation may be a trustee, and if incapable of executing the trust, equity will appoint some person who is not.

Vidal v. *Girard's exrs.*, 2 How. 127.

This is elementary doctrine on the subject of trusts.

It is a rule that admits of no exception, that equity never wants a trustee; or in other words, that if a trust is once properly created, the incompetency, *disability*, death, or non-appointment of a trustee shall not defeat it.

1 Perry on Trusts, sec. 38.

The United States, and each of the separate States, may sustain the character of trustee. (Perry, sec. 41.) Corporations may be trustees, and if they misapply the trust funds or refuse to obey the decrees of Court, the Court may remove them and appoint a new trustee.

Powers are not imperative, but trusts are always so. Where a trust is created, the person creating it means that it shall be executed at all events.

The individual or corporation named as trustee is only the nominal instrument to execute that intention, and if the instrument fail to execute from any circumstance, the law provides an instrument. There is

always a *personality* in the choice of trustees; but if the trust can not be executed through the instrument named by the person creating it, it must be executed through the medium which the law has substituted in his place.

> For, if the trust or power can by *any possibility* be exercised by the court, the non-execution by the party intrusted shall not prejudice the party beneficially interested, or the *cestui que trust.*
>
> *Brown* v. *Higgs*, 5 Ves. 505.
> Perry on Trusts, sec. 249.

Here we have a neglected trust. The trustee says it can not execute it; that it is powerless to do so; not by reason of defective powers, but that it is unable to employ the instruments necessary to its execution. The corporators, who authorized the creation of the debt, are hostile to its payment. They have thrown obstacles in the way of the trustee until it is powerless to go further.

The Supreme Court, in *Batesville Institute* v. *Kauffman*, 18 Wall. 154, said,

> That the court have power to appoint a new trustee and to compel the performance of the trust by him, is quite certain. It is, however, equally within the power of a court of equity to decree and enforce the execution of the trust through its own officers and agents, without the intervention of a new trustee.

Is this not a case for the exercise of such power? We are asking that it be enforced through the officers and agents of this court.

There can be no question to our right to this relief if the defendant were a private person or corporation. Does the mere fact that it is a public corporation destroy the rules "authorized by the principles and practices of

courts of equity"? In the language of Mr. Justice Strong, in *Meriwether* v. *Garrett*,

> It can make no difference that the city of Memphis was a municipal corporation. Its charter as such does not affect the nature of its obligation to its creditors, or its *cestui que trust*, or impair the remedies they would have if the city was common debtor or trustee. While as a municipal corporation the city had public duties to perform, yet in contracting debts authorized by the law of its organization, or in performing a private trust, it is regarded by the law as standing on the same footing as a private individual, with the same rights and duties, and with the same liabilities as attend such persons.

The case of *Montpelier* v. *East Montpelier*, 29 Vt. 12, was where property held by the town in trust for its inhabitants, and the Legislature having abolished the town and created two towns out of the territory, but made no provision for the trust property, the Court appointed a trustee to administer the trust. The Court said:

> If a trustee has been named who refuses to accept the trust, or has deceased, or if from any other cause there is a failure of a regular appointed trustee, a court of equity will take upon themselves the due execution of the trust, and if necessary will appoint other trustees to carry the trust into effect.
>
> It is a well-recognized principle in equity, as a contract can not be impaired, that where there is any fund to which the creditor has a right to resort for the enforcement or payment of the contract, it will be followed by a court of equity.

Beckwith v. *City of Racine*, 7 Biss. 146.

See also *Curran* v. *State of Arkansas*, 15 How. 304.

It is also insisted that a tax is not a debt, and that taxes can not be recovered by an action at law or in equity.

In Kentucky, all taxes due the State or county are a lien on the property assessed, and on all other property of each person, which can not be defeated by gift, sale, alienation, or any means whatever.

Art. 1, sec. 2, chap. 29, Gen. Stat., p. 709, reads thus:

Sec. 2. The Commonwealth shall have a lien for the revenue, railroad, turnpike, or other tax. and the counties for the county levy and other taxes due the county, on the property assessed, and on all the other property of each person, which shall not be defeated by gift. devise, sale, alienation, or any means whatever.

If taxes are not paid by June 1st in each year, the sheriff may distrain the goods and chattels of the person from whom the tax is due, and sell the title of the person in the property.

Art. 8, sec. 7, p. 732, is as follows:

Sec. 7. The sheriff, from and after the first day of June in each year, shall collect the taxes due in his county, and, upon failure by the persons bound therefor to pay the same, may distrain the goods and chattels owned by, or in the rightful possession of, the persons from whom tax is due, notwithstanding the existence of any lien upon the same; and may proceed to sell the title of such person in so much thereof as will pay the tax due, and all costs, in the mode prescribed by law. He shall retain the amount of tax, county levies, and other public dues against individuals out of any claims allowed by the Commonwealth or the county court to such individuals, notwithstanding any assignment of the same.

He may also give notice to any person indebted to the person owing taxes, specifying in the notice the amount of the tax, and to that extent the notice operates as an injunction.

Art. 7, secs. 1 and 2, Gen. Stat., pp. 736–7, is as follows:

Sec. 1. If the sheriff or his deputy, or other person having revenue, county levy, or other taxes of any character, or other public dues in his hands for collection, believes another person is indebted in money or property to the person owing the taxes or public dues, he shall deliver to the person owing the taxes, if in the county, and to the person owing him any where he may be found, or cause it to be done, written notice, in substance as follows:

Mr. A B, the taxes due by C D amount to the sum of $——— — cents. To that extent you are notified not to pay or deliver to him any money or property which you now are, or may hereafter be, indebted to him, and to appear before the county court of ——— county on the first day of its next term, to show why you shall not be adjudged to pay said taxes. This — day of ———, 18—.

—— ———, *Sheriff.*

Sec. 2. This notice shall be signed by the sheriff or his deputy, or by the collector, and shall operate to enjoin the persons named in it from paying the amount mentioned in the notice money, property, notes, accounts, or other thing of value owing at the time of service of the notice, or accruing thereafter, until the matter is heard by the county court. On the hearing by the county court, the person indebted to the person owing taxes shall be compelled to disclose, on oath, in open court, all matters of account and indebtedness, whether for money, property, or labor owing at the date of the notice, or incurred thereafter. The court shall direct the person owing the person from whom the taxes are due to pay or deliver any money, property, or other thing then, or at the time notice was served, coming to the person owing the taxes, to the sheriff or collector, to the extent of such taxes and costs, or to the extent of his liability, including such as accrued after notice, though paid or discharged; and if it be property, the sheriff shall sell the same, in the manner he is directed to sell like property when sold for

taxes. If the persons so indebted to the person owing taxes fail to attend, or fail to make disclosure, the Court shall render judgment against them for all the taxes.

In the case of *Johnston* v. *Louisville*, 11 Bush, 533, the question of right to maintain an action of debt for a general tax-levy was involved, and the Court held that if the remedy given by statute was full, adequate, and complete, the power of collection was restricted by implication to the statutory mode of collection. But the Court said,

If the remedy given by the statute be not adequate, then there will be no implication that it was intended to be exclusive and resort may be had for the execution of the power or the enforcement of the right to the ordinary process of the law—i. e. judicial proceeding.

We think the conclusions reached by the Court in that case justify, in cases circumstanced as this is where the remedy is not adequate, a resort to the enforcement of the right by "judicial proceeding."

The Court deemed it "wholly immaterial" whether a tax "be a debt or a duty."

It may happen [said the Court] that in some peculiar cases, such as those in which the remedy prescribed by the charter is ineffectual, that payment may be enforced by appropriate judicial proceedings. But it is only in such exceptional cases that there can be any necessity to resort to the courts; and in all cases in which such necessity does not exist, the remedy provided by the charter should be held to manifest the intention of the legislature to exclude all others.

We think this is one of the "exceptional cases" referred to by the Court, and all the remedies provided

by statute having proved ineffectual, the necessity exists for a resort to the courts.

There is some confusion and seeming conflict in the decisions of the Supreme Court on this subject. In the case of *Lane County* v. *Oregon*, 7 Wall. 71, the Court held that in such cases as that was, a tax was not a debt. That was a construction of the legal-tender laws, and the Court merely held that "the Congress of the United did not, by the use of the word 'debt' in that act, intend to include taxes of the States."

In the *Dollar Savings Bank* v. *United States*, 19 Wall. 227, which was a suit to recover internal revenue taxes, a recovery was resisted on the ground that a tax was not a debt and could not be collected in action of debt, but the Court held that it could be so collected.

Mr. Justice Miller, in the case of *United States* v. *Pacific Railroad*, 4 Dillon, 66, after reconciling the conflict in the two cases above cited, said,

> It is immaterial what you call the obligation of a citizen to pay his taxes; it is very clearly an obligation which may be enforced by the courts. In the case from the State of Pennsylvania it was simply a suit for taxes, and nothing else; but if it was not such a suit, an equitable lien, it is claimed, would give the right in chancery to recover what was merely a debt at common law.

In numerous instances the right of the United States to sue for taxes has been maintained, and the suit against Mr. Tilden is, we believe, brought to recover taxes claimed to be due.

The taxes here levied are by law a lien on the property against which they are assessed. They are made so by express provision of statute. It is the peculiar

province of a court of equity to enforce liens where no other mode of enforcing them exists. We do not claim that such a lien exists until the levy is made. We concede that it does not, but here there is a levy.

This case is not like that of *Rees* v. *City of Watertown*, 19 Wall. 107. There the tax had not been levied, and the officers whose duty it was to make the levy resigned, and there was no one on whom the writ of mandamus could operate. We do not claim that this court can levy a tax. Our tax has been levied by the constituted authorities. No other levy is blended with it. The sole object of this levy was to pay complainant's judgment.

The trustee named by the State is powerless to execute the trust by reason of the state of society in that community. Under such circumstances the relief "authorized by the principles and practices of the courts of equity" requires the execution of the trust by the court, either by requiring the parties to pay the amount due by them into court or the appointment of a receiver; either mode will be effective.

THE FOREGOING

Presentation and authorities, we respectfully suggest, fully confirm appellant's right to relief from the equity side of this Court; the appellees fully concur in this proposition, and if there is otherwise any doubt or hesitancy as to the granting thereof, that concurrence of the appellees should remove it. They recognize their inability to have the tax collected through the sheriff or special collector; the first claims to be relieved by the act of 1876, and no one will become collector, and this caused them to substantially voluntarily declare, and in

the aforesaid stipulation to enter it as an admission and agreed fact on the Record, that the special tax levy of 1881 can only be collected through and by the orders of the Equity Court and an officer thereof. That is a truthful admission: the past, present and *determined future* of matters in Allen county, backed by all the help the Legislature can give, establishes beyond doubt, that, unless the United States Court gives relief, appellant's judgments never will be satisfied. Is all of the foregoing, to be treated as of no force and to be without effect? Upon the contra thereof, if any thing is wanting to induce and authorize decisive favorable action by the Court, it is presented in the full, clear meaning purpose of the forcible terms of the aforesaid *stipulation*, which, in addition to admitting that it is useless to rely on either sheriff or collector, fully concedes that the hostile threatening people of Allen county will disregard, overawe, and refuse to pay any one except an appointee of the Court. This case then can be stated as follows:

Appellant has judgments for unpaid bond interest for over $20,000; executions returned, No property; the County Court, upon being required to do so, levy a proper tax upon the regularly assessed estate in the county, to satisfy appellant; he desires to have that tax collected, and finds to his prejudice, that the sheriff, in violation of correct principle, has been released, entirely freed and excused from collecting, and the County Court that has the power to appoint a collector, can not get any one to accept the office; the appellees then come and enter of record that appellant can not be paid what is owing him unless the Court causes it to be collected; the appellees declare the only remedy is through a Receiver of the Court, or some other proper order of the Court.

There have been Opinions rendered in Kentucky, very clearly indicating that an Equity Court should not have any hesitancy in granting the relief desired.

Chief Justice George Robertson, one of the once great lights of Kentucky, appropriately declared "*that a Court of Equity is to give that remedy to which the party is by law entitled, but for which the mode of proceeding at law is inadequate.*" (Newman, p. 6.)

Inadequate, a most appropriate term, the meaning whereof he fully understood; a word that the dictionary had told him meant insufficient, not equal to the purpose, to the occasion, insufficient to effect the object desired, incomplete, defective,—just like the law remedy that the defence offers to the appellant, a remedy without effect; defective, incomplete, accomplishes nothing for him; and therefore he desires a remedy that will be adequate—complete, give effective relief, a remedy from the Equity Court.

"WHERE LEGAL REMEDY IS GREATLY EMBARRASSED," RELIEF SHOULD BE GIVEN IN EQUITY.

6 Dana, 70, *Turnpike Co.* v. *Waters.*

Waters went to equity alleging that by the terms of a contract, the superintendent was umpire and his award final; that he had expressed himself verbally as to exclude him from acting; this the company denied, the proof inclining in their favor, and insisted the common law court alone had jurisdiction. The Chancellor decided against them and they appealed. The celebrated Judge Thomas A. Marshall, affirming, declared whether the grounds of complaint were or not sustained, yet upon them, and because the legal remedy by action on the agreement, if not entirely precluded, is so greatly embarrassed, we think, a Court of Equity may take jurisdiction and

compel the defendants to do what justice and good conscience required.

NO LEGAL REMEDY.

In *Mattingly* v. *Carbot* (Kentucky):

It is decided that a creditor party who has no legal remedy, has a good equitable jurisdiction.

Judge Martin H. Cofer, another once distinguished Kentucky jurist, in 1877, in *Prather* v. *Davis*, 13 Bush 377, says:

There was no statute authorizing the decree rendered, and if there was any power to make it, it was a power inherent in the Court.

It seemed to him, therefore, that when the Chancellor finds a party with a legal right, but without a remedy to enforce it, the Chancellor should furnish an *adequate* remedy.

Judge Cofer's "*adequate remedy*" gave effective, complete relief. *Repudiation* in those days met with no favor. *Repudiators should* not *be* aided by the Courts to carry their dishonest contrivances into successful practice.

THE U. S. COURTS—FOLLOWS THE PRACTICE UNDER STATE STATUTE.

In *Supervisors* v. *Rogers*, 7 Wallace, p. 175: The U. S. Marshal was directed to LEVY AND COLLECT the taxes named in the writ and pay the judgments, interest, and cost thereon; that order was entered because the code of Iowa authorized the Court to direct the writ of mandamus to the plaintiff in the motion, or any other

person authorized by the Court to perform the duty; that this could be done, because the United States has power to adopt in a particular case the Rule of Practice under State statutes. Justice Nelson, saying:

> That the Iowa section is but a modification of the laws of England and of the New England States, for enforcing a judgment against city, county, or town, by execution against the private property of any individual inhabitant, giving him the right to claim contribution from the rest of the people."

And the Court had the right to enforce it.

The foregoing enunciations of those eminent Kentucky jurists are explicit as to the meaning of Equity in Kentucky, and the power of Equity Courts to exercise the "*inherent*" power of furnishing an "*adequate remedy*," where otherwise there is none. According to Judge Cofer, this is the course pursued by Equity Courts in that State. And on principle, propriety and common justice is of itself all-sufficient, in this case, to authorize the United States Court to do, as would be done by the Kentucky Equity Courts.

A hasty look into a few decisions in Ohio and Massachusetts (those books being at the moment within easy reach of the writer hereof) disclose that the terms *adequate* and *inadequate* are there used to indicate, that the Equity Court takes jurisdiction whenever a party could not otherwise obtain efficient or complete relief at law, or where the law remedy was inadequate. See Wright's Ohio and Allen's Mass. Many additions could be made to the above—but in response as to Kentucky the defence will refer to the action of the present Kentucky Appellate Court—*McLean County* v. *Deposit Bank*—wherein relief was denied in Equity; but

an examination of that case will show it to be entirely different from this one, in several important particulars.

The Chancellor of the McLean Circuit, following in the Equity land-marks, pointed out and observed by George Robertson, Thomas A. Marshall, Martin H. Cofer, and other *bright lights*, inasmuch as the *law officer* had returned the execution, No property, and the special collector referred to in the law was not in existence, never had been, and under the manipulations of the defence, never would be "*invested*" with life. And believing that complainant was otherwise without remedy, assumed jurisdiction and rendered an *Order* calculated to give *adequate* relief, requiring nothing more than the defence admitted was due from them.

But the now Appellate tribunal of Kentucky, not fully realizing that certain authorities quoted from this Supreme Court, was not that case, and did not go to the extent of sustaining Precinct No. 3 in repudiating their debt, reversed the McLean Chancellor, and sent the holders of the debt to the Legislature, where they were certain to be treated with conclusive indifference and contempt.

It is a matter of wonder that the deservedly distinguished *Reversing* Judge did not notice the aforesaid and hereinafter stated *difference*, and as we respectfully suggest, did not realize that the United States and Kentucky cases relied on did not fit the McLean county case; but, whether they did or not, they most certainly, when fully comprehended, are not adverse to this one, and in the most important reference, the controlling question was not decided, but left open, for future consideration. The opinions above relied on, as we conceive them to be, are as follows:

1. *Rees* v. *The City of Watertown*, 19 Wallace 120.

There was no statutory provision for tax to be levied to satisfy bonds held by Rees; the mandamus that required the tax to be levied and collected *was not executed*—there was no lien in his favor; upon the contra, when the bonds issued, the charter of the city, then in force, forbid the levying of any execution upon the real and personal property of any person in the city, to satisfy any debt, obligation, or contract. This was relied on in defence, and according to Justice Hunt, was decisive against Rees.

2. *Heine* v. *Levee Commissioners*, 19 Wallace 655.

There was no judgment; taxes were not assessed or levied; the mandamus was not executed, and the opinion refers particularly to the fact—of there being no lien.

3. *Barkley* v. *Levee Commissioner*.

He was a public creditor without special lien; had judgment against the corporation, which by the terms of the law dividing the district, created a new one, and placed the other under local charge; the corporation ceased to exist, except for a special object, and was *de facto* extinct. His claim was for work and labor on the levees, which caused a full discussion of the law in regard to levees. The decision of the Court was, in that case, as there was no officer to whom the writ could be directed, mandamus would not lie. That the Court, by mandamus, could not compel *new* corporation to levy taxes for payment of debts, where territorial jurisdiction is not the same, can not direct Marshal to *levy* taxes, except where special law authorizes.

4. *Meriwether* v. *Garrett*, 102 U. S. 472.

Did not decide the important issue in this, because that case did not require it, and is no authority in favor of the Reversal in McLean county case, as fully apparent. *Supra* 21, 22, 25.

5. *Wolf* v. *City of New Orleans*, 103 U. S. 357.

There is nothing in this case favorable to the McLean Reversal; but on the contra, this appellant can not but approve of the declaration—"that laws are void which withdraw or restrict the taxing power to impair the obligation of a contract," and copies from *Van Hoffman* v. *Quincy*, that if such laws be made, mandamus to compel the exercise of the power to the extent possessed before the passage of the illegal act will be in favor of a party to such contract who has no other adequate remedy to enforce it.

6. The Kentucky—*Pennington* v. *Woolfolk*, 791 Eq. 13, is entirely inapplicable.

7. *Johnson* v. *City of Louisville*, 11 Bush 527:

Is not a favorable reference. Appellate Justice Cofer does NOT deny the right to proceed in any other mode than that provided by the Statute.

On 523, he says:

If the remedy given by the Statute be not adequate, then there will be no implication that it was intended to be exclusive, and resort may be had, for the execution of the power or the enforcement of the right to judicial proceedings.

And refers

To 23 Iowa, p. 412: The charter of Burlington conferred power on the City Council to levy and collect

taxes to pay for street improvement, but gave no mode for collecting the tax. The Council therefore could not sell, or give any of its officers jurisdiction, but as the expenditure was declared a lien, and as liens may be enforced in equity, the power may be exercised through the Court.

To 1 Halsted, New Jersey 365: Where a tax is assessed, if it has been done in a legal manner, the quota apportioned upon each individual, if not paid, must be recovered by due course of law.

To 15 Illinois, p. 97: The tax is not an ordinary debt; it is a charge upon property without reference to the matter of ownership, and may be seized and sold, although there were prior liens or incumbrances.

The points and reasoning in the aforesaid quotations, are not against this appellant. In his case there are three parties in interest: the *State*, the *Makers*, and the *Taker of the Bonds*. The State and the County of Allen each expected to be greatly benefited by the building of the Road, and it could only be accomplished by realizing from bonds. Every necessary inducement and guarantee, therefore, was presented by the State, in the favorable provisions of the enabling Statutes, and by the county after a favorable vote, in issuing bonds and obtaining valuable consideration therefor; and then, after they were disposed of, said *State and County*, the first and second of the three parties, unite and by a legislative act joined to the hostile feelings of the officials and people of the county, prevent the *third* party from being paid according to promise, and although greatly injured by the non-payment, he is calmly told, if the other parties were mere private individuals, re-

lief could be readily furnished; but as one is a State, and th other a County, the Court can only advise the injured private citizen to try and induce the First to amend the law, and permit the Second to be coerced into paying its just debt—must make that appeal to the State, from whom the worst part of the blow that injured was received; the injured holder of the claim must, lamb-like, seek protection from the king of the forest; must, with the meekness of a mendicant, solicit needed sustenance; beg for bread; beg for it, although he knows—the Court is fully aware, every thoughtful mind is satisfied—that he will most certainly get nothing more than a stone.

It is adversely suggested, as the experience of every day, "that debts are created which are never paid, though the creditor has exhausted all the resources of the law." That truthful declaration should be accompanied with the further statement that the non-payment is because of the utter insolvency, or successful fraudulent conduct and concealment of the debtor. If he has estate not covered by false deeds or some other rascally contrivance, the debt in part or in whole by proper process is forced to be paid; if the debtor is a mere private individual, owing a debt, legally binding on him, and he is able, he must pay; the Court shows him no favor; they do not try to hunt up far-fetched miscalled principles to ease him from paying. But if in connection with divers other who lay claim to be citizens, and he and his co-mates vote a liability upon themselves, induce an outlay of labor, material, and money to be made, under the belief that it will inure to their benefit, and then issue promises to pay, and when putting them forth, feel very good over their importance, willingness and ability to pay, and are very

dignified at the idea, that their combining thus together has made them some kind or sort of a corporation; but after a while pay-day comes, the Courts are besought to tread very cautiously, to remember the Promisers composing the combination creating the liability, are citizens; and although the liability created puts them in debt as tax-payers, great principles, fundamental, old, new and obsolete, must be gathered together, hurled at the luckless holders of the promises; and the makers covered over and surrounded with technicalities, freed from the power of the Courts, and suffered to rest in peace and safety in the friendly arms of a protecting Legislature, freed from the power and control of the Courts, and although the voluntary creation of the liability is freely admitted, yet the aforesaid great principles, some of them claiming an origin anterior to the foundation of the world, forbids judicial interference, and the obligors with judgments against them unsatisfied, executions returned "no property," retain all the estate that was possessed when the liability was created, are practically to all intents and purposes totally absolved and discharged, without being subjected to the stigma of being either insolvent or bankrupt.

If it was Jim Allen alone, instead of divers Jims, Johns and Sam Allens combined together as citizens, the case would wofully to the individual James be very, very different.

It may be, and doubtless is, all right to tread lightly on the voluntary debtor, tax-payer citizen, but there is another kind of citizen who should have some little attention, and whilst treading cautiously as to the debtor, care should be taken not to throw all the weight on the other leg and crush the creditor citizen out of existence.

WHO IS AN OFFICER?

Webster defines him to be—"*A person commissioned to perform a public duty.*"

Bouvier says an officer is—"*He who has been legally invested with an office.*"

Wherefore, we repeat, that no one has ever been "commissioned," or legally "invested," or authorized to collect railroad taxes in Allen county. There is no person who can to the slightest extent be looked upon or *contemplated*, as being a collector of railroad taxes in that county, and as heretofore shown, appellee admits there is not, and never has been such an officer in that county.

ASSESSING AND COLLECTING

Are two distinct matters. The first requires the assessor (a State officer) to find and know the value of the property at the place of assessment. This calls for the exercise of skill, sound impartial judgment, and the assessment is for the State, county, and corporation—the same figures apply for each. He is a State officer, gives bond with sureties to the State, is not appointed by, or subject to be superseded by the County Court.

The act of 1869 chartering the Company gave the County Court power to require the Sheriff to collect the railroad tax, making him and his sureties liable for it on his official bond. Or said Court might appoint a collector of the railroad tax, taking bond with sureties to be approved by the Court; the bond was not required to be to the State.

Subsequently, in 1876, the State released the Sheriff and declared the sureties in his official bond not liable for railroad taxes, and again empowered the

County Court to appoint a Collector and take bond with sureties frcm him, to be approved by said Court. If the Court had appointed such Collector, he would have been the Collector of and his bond given to the Allen County Court, responsible to it, just as a Treasurer, Collector, or Cashier would be to a Gas Company or Bank.

The State has given the appointment of Collector of railroad tax to the County Court; a Court that is substantially, effectively the agent and representative of the people and tax payers of Allen county; the members of which Court are citizens and tax payers of the county, elected by the people thereof to constitute the Court, and that tribunal, like the balance of the tax payers, are opposed to paying the railroad tax, and having no desire therefore to pay them, very efficiently determine their most effective remedy against paying, is, not to appoint a Collector, and they have not, never will make an appointment.

And to the end that no person shall be authorized by the order of another but higher Court to collect, the said County Court, representing Allen county and its tax payers, were in the United States Court at Louisville, and will be in this one, with able and distinguished counsel, in order to induce being let alone, and BY THE NON-INTERVENTION OF THE UNITED STATES COURT FEEL safe for all time to come, be the same as forever relieved from paying the judgments against them, and every claim hereafter asserted, whether it be for the interest or principal of the promises they made.

DISMISSAL OF PLAINTIFF'S BILL.

Under the circumstances of this case, viewing it

from appellee's standpoint, the refusal to relieve should not have been by a peremptory dismissal; but proper attention have been given to the individual citizen tax payers before the Court. And the dismissal, at least, should have been *without prejudice*, and thereby prevented *Res Adjudicata* from being pleaded to any subsequent proceeding; for even if unsuccessfully pleaded, it would be troublesome and prolong litigation. Furthermore, that dismissal should have contained a *Nisi Provision*, requiring definite successful action by the County Court, in obtaining and investing an officer with life to collect, and have collection made within a specified time, or the Court would attend to the collection, which would have been a wise, justifiable Order.

FROM THE INJURIOUS

Effects of that peremptory dismissal appellant prays to be delivered by this Supreme Court.

Application to the State for relief is useless; it is not to be obtained there; the law-making power is under the control of the belligerent repudiating obligor.

The County Court of Allen county, in its members and those they represent, is too much interested against doing right, to obey the law or do justice to appellant; he can not hope for it from them.

Justice Blackstone defines *Equity, in its true and genuine meaning to be the soul and spirit of all law, construing Positive, and creating Rational law, and in this declares Equity synonymous to Justice.* Wherefore appellant turns from the State and that one side interested County Court, to this Supreme Judicature, for that relief which the existing law and principles of equity authorize; and prays for a reversal of the decree

dismissing his bill, and that an affirmative answer may be given to each of the three certified "occurring questions," on page 7, of the Record, to be accompanied with an appropriate *Order* to make them effective. The county and its inhabitants are before the Court. The amount due by each of them is set out in the pleadings. The Court is in full view of the persons owing the debt. Their property is in sight, and is incumbered for the amount. The Court has but to lay its hands on the property, and that is the end of it. Is the Court powerless to do so? By a long line of adjudication the Supreme Court has with steady resolution set its face against repudiation in all forms. It has protected the commercial honor of the country. We ask no departure from well-established principles of law; but to use a homely phrase, we have reached the forks of the road. The one leads to honor, the other to dishonor.

We respectfully request that Appellant may obtain the desired Relief.

W. O. DODD,

CHAS. EGINTON,

Counsel for Appellant.

115-560

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Supreme Court of the United States.

OCTOBER TERM, 1885.

T. W. THOMPSON, *Appellant,*

vs. } No. 60.

ALLEN COUNTY, *et al.*, *Appellee.*

SECOND BRIEF FOR APPELLANT.

ARGUMENT BY W. O. DODD, FOR APPELLANT.

CHAS. EGINTON,
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Counsel.

L. D. CRONINGER PRINT, COVINGTON, KY.

Supreme Court of the United States.

OCTOBER TERM, 1885.

T. W. THOMPSON, *Appellant*,

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ALLEN COUNTY, *et al.*, *Appellee*.

SECOND BRIEF FOR APPELLANT.

The question presented by this record is, whether taxes levied in obedience to judicial direction to pay contract obligations, can be collected through a receiver appointed by a Court of Chancery, where there is no public officer charged with authority from the Legislature to perform that duty.

The Legislature of Kentucky authorized Allen county to subscribe for stock in a projected railroad through that county, provided a majority of votes cast at an election, to be held for that purpose, should favor such subscription. The necessary election was held, and the authority given to make the subscription, and the subscription was lawfully made.

The county was authorized to issue its interest-bearing bonds in payment of said subscription, and such bonds, with interest coupons attached, were issued.

The County Court was required to annually levy and collect a tax upon the taxable property in the county, sufficient to pay the interest on the bonds, and to provide for the payment of the bonds at maturity.

Said Court was authorized to appoint a collector of the tax, or it might require the sheriff to collect it; and the tax, when levied, was to be a lien on all the personal and real estate in the county, of the person taxed. It was also declared by the statute, that the collector of said tax "shall have the same powers and remedies, and shall proceed in the same way, for the collection of said tax as the sheriffs in the collection of the State revenue."

By a subsequent act the sheriff was relieved from the duty of collecting the tax, and it was then made the duty of the Court to appoint a collector for that purpose.

The appellant became the owner of a large number of the bonds issued by the county under the provisions of said statute. The coupons were not paid at maturity. Suits were brought by appellant, on past due coupons, in the Circuit Court of the United States for the District of Kentucky. Judgments were rendered and executions issued, which were returned unsatisfied. Appellant then sued out a writ of mandamus against the County Court to compel a levy and collection of a tax sufficient to pay the judgments.

After fruitless attempts at evasion, a levy was made of a tax sufficient to pay the judgments, and a collector was appointed, who refused to qualify, and no

person could be found who would qualify and collect the tax.

Under this state of case appellant filed a bill alleging the foregoing facts; and further, that on account of the hostile sentiment of the tax payers, no one would qualify as collector; that the taxes so levied constituted a trust fund for the payment of complainant's judgments, and that he was without remedy except such as a Court of Chancery could give—either by the appointment of a receiver to collect the taxes, or by compelling the tax payers to pay the money into Court by appropriate orders and judgments.

Various tax payers were also made defendants, and the assessments and levies against each of them were set out in the bill, and judgment was asked for the several amounts due, or that they be required to pay said amounts into Court, or to a receiver appointed by the Court, for the use and benefit of appellant

The defendants answered and raised the question of jurisdiction in the Court to collect taxes levied under judicial direction for the payment of contract obligations. Exceptions were filed to the answer, and on the hearing thereof, in order to simplify the question (the Court making the suggestion) a written stipulation was filed, which is as follows:

1. That the County Court of Allen county has in good faith and diligently endeavored to find a fit and proper person to act as collector of the railroad taxes, in said county, and of the special levies of taxes in the bill of complaint set forth.

2. That no such fit and proper person can be found who will undertake and perform the office and duty of such collector.

3. That the complainant is without remedy for the collection of its [his] debt herein, except through the aid of this Court in the

appointment of a receiver, as prayed for in the bill, or other appropriate orders of the Court. [Printed Record, page 11.]

The action was then submitted for judgment, and the Circuit Justice, the Circuit Judge dissenting, dismissed the bill. From that judgment this appeal is prosecuted. There was also a certificate of division in opinion between the Judges, and certain questions were certified to this Court, but as there is substantially a single question in the case, we will argue it as though it were an ordinary appeal.

ASSIGNMENT OF ERRORS.

1. The Court erred in dismissing the bill of complaint. If appellant was not entitled to the relief prayed, his bill should have been dismissed *without prejudice*, and not generally, as was done.
2. The Court erred in refusing the relief prayed.
3. The Court erred in refusing any relief.

ARGUMENT.

There can be no serious doubt, we apprehend, that the decree must be reversed, if for no other cause, at least, because it presents a bar to future proceedings. The judgments are not satisfied. The claim is admitted to be due, yet the Court dismissed the bill, and in any future action we would be met with a plea of *res adjudicata*. The Court below, entertaining the opinion that the appellant was not entitled to the relief prayed, should have dismissed the bill *without prejudice*. That was the character of the judgment directed by this Court in *Meriwether* v. *Garrett*, 102 U. S. 502, and by the Kentucky Court in *McLean County Pre-*

cinct v. *Deposit Bank*, 81 Ky. 254. We should be left to pursue all legal or equitable remedies that the law gives until the debt is satisfied. These taxes are a lien upon all the property in the county. Suppose a tax payer wishes to sell his property free of lien, and goes into the County Court of Allen county, and pays the amount of his tax into Court, and has the lien released. We can not now enjoin the county from using that money for other purposes, although it can not be lawfully applied to any other purpose. From this dilemma we wish relief.

II.

This case is free of many difficulties that have been encountered by this Court in the past. We are not asking the Court to make a *levy* of a tax. That has been done. And the levy is not confused with any other thing. No part of it is for any governmental, or other purpose, save the payment of appellant's judgments. It was levied under judicial direction to pay a single contract debt. That debt was not created in the exercise of any governmental function. Neither the case of *Rees* v. *City of Watertown*, nor *Heine* v. *Levee Commissioners*, 19 Wall., have any application to this case. In those cases the right of the Court to *levy* a tax was the sole question. But we have no such case.

The question here presented has never been passed upon in this Court. It was expressly left open in the case of *Meriwether* v. *Garrett*, 102 U. S. 501. For in the fourth finding, or conclusion of the Court, it is there said:

> Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver ap-

pointed by a Court of Chancery, if there be no public officer charged with authority from the Legislature to perform that duty, is not decided, as the case does not require it.

In that case there was a public officer charged with authority to collect the tax, who had qualified as such collector and was endeavoring to collect the tax. In this case there is no such officer, and the stipulation *supra* expressly provides that appellant is *without remedy for the collection of his debt except through the aid of the Court in the appointment of a receiver, as prayed for in the bill, or other appropriate orders of the Court.*

The question, therefore, is whether the Court, after levy made, can collect the tax when there is no other remedy now, and never can be, for that is the stipulation.

We will attempt to show that it can.

And, first, we will show the condition of Kentucky law on this subject. The statutes of the State, on that subject, are set out in the brief of my colleague, Mr. Eginton, and from them it will appear that all the rights, powers, etc., given to sheriffs in the collection of the State revenue, are given in the collection of this railroad tax. What are those powers as defined by the Courts?

In the case of *Johnston* v. *Louisville*, 11 Bush 533, the right of the city to maintain an action in chancery, for the collection of a general tax levy was involved, and the Court there held that if the remedy given by statute was full, adequate, and complete, the power of collection was restricted by implication to the statutory mode of collection. But the Court there said:

If the remedy given by statute be not adequate, then there will be no implication that it was intended to be exclusive, and re-

sort may be had for the execution of the power or the enforcement of the right to the ordinary process of the law. *i. e.*, judicial proceeding.

And it was in that case expressly held that where the remedy prescribed by the charter was *ineffectual*, that payment might be enforced by appropriate judicial proceedings.

The case of *McLean County Precinct* v. *Deposit Bank*, 81 Ky. 254, was where a part of a county, called a precinct, was authorized to subscribe for stock in aid of a contemplated railroad and to issue its bonds, to meet which a tax was provided, and the County Court authorized to appoint a collector. The tax was levied but no one would qualify as collector. A creditor holding a number of the bonds applied to a Court of Chancery, making the necessary averments, and asked the Court to appoint a receiver or collector, which was done. It does not appear that the levy was made under judicial direction, or to pay the debt of the complainant, but it appears to have been a general levy made in pursuance of duty under the statute The case was decided in June, 1883. The Court there held, that

> If the legislation in regard to the collection of taxes, whether for the purpose of affording revenue for the State, or of satisfying a debt due to a corporation by reason of a county or precinct subscription, proves defective or inadequate for that purpose, the remedy is not by applying to a Court of Equity to cure the defect, but the legislature, under the constitution, can alone supply the defect by amended legislation.

It will be observed that the language used is broad and applies alike to the State revenue and to private contract obligations.

But it did not appear in that case, as in this one, that the legislature could and would not give any relief. But the foregoing case would never have found its way to the Appellate Court, but for the opinion of Mr. Justice Matthews in this case. And it is made to rest squarely on that opinion. But unhappily for the stability of judicial decisions and to better illustrate the "glorious uncertainties of the law," we come to the case of *Louisville Water Company* v. *Hamilton*, 81 Ky. 517, decided by the same Court that decided the McLean County Case, and the opinion delivered by the same Judge.

The Water Company Case was decided December 20, 1883, and the McLean County Case was decided June 14, 1883, and no reference is made in the later opinion to the former one. The Water Company is a corporation, the greater part of its stock being owned by the City of Louisville. It filed a bill to enjoin the sheriff from collecting taxes assessed against it for public revenues. It claimed exemption from taxation by statute and on various other grounds. The property of the company being an entirety, like a turnpike or railroad, could not be sold for taxes except by legislative direction, which had not been given. It therefore presented a case where the remedy given by statute was inadequate. Why? Because of the absence of the power to sell. What did the Court say?

> The chancellor having been appealed to by the appellant for some sort of relief, should have taken cognizance of the case, and required the appellant by rule to pay the money into Court, and, if not, to place the management of the corporation in the hands of a receiver, in order that the burden might be discharged. * * * The judgment is reversed with directions to stay the hands of the collecting officers, and to enforce collection as herein indicated.

What right had the Court to lay its hands on the property of this company? Because the remedy given by statute was inadequate. It did not occur to the Court that in taking hold of this property it was invading the legislative department of government. The company paid the money and no earthquakes followed, not even an increase of water rents. So that the rule in Kentucky may be stated to be, that where the State is seeking to gather in its revenue, and the remedy given by statute is inadequate, the Courts will supply the defect. But if a corporation, or citizen, seek to gather their revenues, under precisely the same statute, and the remedy is inadequate, the Court can not supply the defect without invading the legislative department of government, which it can not do. This sort of reasoning can not commend itself to the Court. The two last cases can not be reconciled. And if the same rule is observed as in the construction of statutes, the last case overrules the former.

But aside from Kentucky statutes and decisions, and treating the statutes as providing a remedy which is inadequate, we contend, that in a case circumstanced as this is, a Court of Chancery can compel the payment of the tax, and that in doing so, it does not invade any other department of government, nor travel in new or unexplored paths.

It is immaterial to this discussion whether a tax be a *debt* or not. For, as said by Mr. Justice Miller, in *United States* v. *Pacific Railroad*, 4 Dillon 66, after reconciling the apparent conflict between the cases of *Lane County* v. *Oregon*, 7 Wall. 71, and *Dollar Savings Bank* v. *United States*, 19 Wall. 227:

> It is immaterial what you call the obligation of a citizen to

pay his taxes ; it is very clearly an obligation which may be enforced by the courts. In the case from the State of Pennsylvania, it was simply a suit for taxes, and nothing else; but if it was not such a suit, an equitable lien, it is claimed would give the right in chancery to recover what was merely a debt at common law.

But *taxes*, so called, levied for purposes and under circumstances, as in this case, are not in any technical sense, taxes. As said in *Lane County* v. *Oregon*, *supra:*

> Taxes are imposts, levied for the support of the government, or for some special purpose authorized by it. The consent of the tax payer is not necessary to their enforcement. They operate *in invitum.*

But not so in this case. Here the taxes could never have been imposed except by the consent and direction of the tax payers. They were required to *vote* for it before it could be imposed. In doing that, they simply directed their agent, the county, to subscribe for them, which subscription they agreed to pay. They thereby directed their agent to fix each year how much each one of them should pay, and they agreed to pay it.

Instead of the individual tax payer subscribing so much stock in the railroad, he authorized his agent to subscribe for him. He knew the agent had no means of paying for the subscription except through the means furnished by him. He agreed to pay such a sum or sums each year as the agent said was his part, and the agent had full authority given to say what that part or sum was. The agent has fixed that sum. And beyond all that, he agreed when the sum was fixed that it should be a lien on all his property.

Therefore, in subscribing for the stock and issuing bonds to pay for the subscription, the county was not

acting in its governmental capacity. It was for the local convenience and benefit of its citizens, like water, gas, parks, etc., in which it acted in its *quasi* private capacity, and was for the exclusive benefit of its corporators. In acting in this private capacity it was on the same footing as the private corporations of the State.

San Francisco Gas Co. v. *San Francisco*, 9 Cal. 453.
Park Commissioners v. *Detroit*, 28 Mich. 238.
Savings Fund Society v. *Philadelphia*, 31 Pa. St. 183.

Upon like principles it was held that where a corporation was authorized to construct and operate a railway; also to own real estate and mine coal, that it was not liable for damages which occurred in the operation of the mining business under a statutory provision concerning railroads.

Claxton's Adm'r v. *Lexington, etc., R. R. Co.* 13 Bush 638.

The dual capacity of the one corporation was there fully recognized. So here; this county has certain functions of government to perform, for which it was created, and for the convenience of its citizens certain other powers are given, which may or may not be exercised, as the citizens may direct.

Bearing this distinction in mind, it is easy to apply the law. The taxes, so called, which were levied to pay appellant's judgments, are in no sense public revenue. The Legislature has no control over them. They can not be released or changed by the Legislature. If the law is repealed under which the levy was made, it will not put an end to the tax. This would not be true of taxes levied for the support of government. This distinction is drawn with great clearness in the separate

opinion of Mr. Justice Field, in *Meriwether* v. *Garrett*, 102 U. S. 514. He there said:

> A repeal of the law, under which a tax is levied, at any time before the tax is collected, generally puts an end to the tax, unless provision for its continuance is made in the repealing act, though the tax may be revived and enforced by subsequent legislation. We say generally, for there are some exceptions, where the tax provided is so connected with a contract, as the inducement for its execution, that the courts will hold the repeal of the law to be invalid as impairing the obligation of a contract. It is not of such taxes, constituting the consideration of contracts, that we are speaking, but of ordinary taxes, authorized for the support of government, or to meet some special expenditure; and these, until collected—being mere imposts of the government, created and continuing only by the will of the Legislature—have none of the elements of property which can be seized like debts by attachment or other judicial process and subjected to the payment of creditors of the dissolved corporation.

This distinction, which is so clearly drawn, simplifies our argument, and makes the converse of the proposition a demonstration, namely, that these taxes were connected with a contract and formed the inducement for its execution, and a repeal of the law under which they were levied, would be an impairment of the contract, and void. So that these taxes have all of the elements of property, and can be seized by judicial process and subjected to the payment of appellant's judgments. The great confusion which has grown out of this Meriwether and Garrett case, has arisen out of the failure to notice the distinction drawn between taxes proper—those imposed for support of government and taxes so called—those imposed to meet the private contracts of the corporation.

This distinction between powers and duties, which are public or governmental, and those that are private, has long been recognized.

In *Mordulay* v. *Morton*, 1 Brown's Ch. R. 469, the Master of the Rolls said:

> I admit that no suit will lie in this Court against a sovereign power for any thing done in that capacity, but I do not think the East India Company is within that rule. They have rights as a Sovereign Power; they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here. So in this case, as a private company, they have entered into a private contract, to which they must be liable.

And so it was held in *Bailey* v. *New York*, 3 Hill 531, where the city, in constructing water-works, had infringed upon the rights of a private individual, and in a suit against the city for damages, it claimed exemption on the ground that it was acting solely for the State in prosecuting the work, and was not liable. But Ch. J. Nelson, speaking for the Court, draws the distinction with great clearness between those powers which are granted for private advantage or emolument. He said:

> But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the special franchises had been conferred. Suppose the Legislature, instead of the franchise in question, had conferred upon the defendants banking powers, or a charter for a railroad leading into the city, in the usual manner in which such powers are conferred upon private companies, could it be doubted that they would hold them in the same character, and

be subject to the same duties and liabilities? I can not doubt but they would. These powers, in the eyes of the law, would be entirely distinct and separate from those appertaining to the defendants as a municipal body. So far as related to the charter thus conferred, they would be regarded as a private company and be subject to the responsibilities attaching to that class of institutions.

This distinction is noted and commented on in the opinion of Mr. Justice Story, in *Dartmouth College* v. *Woodward*, 4 Wheat., pages 668, 672.

And upon like principles it was said by Chief Justice Marshall, in the case of *U. S. Bank* v. *Planters' Bank*, 9 Wheat. 907:

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

There is another feature of this case which we think decisive. The taxes here levied were for a specific purpose, and could not be diverted to any other. The order directing the levy specified to whom the taxes should be paid when collected. A trust was created. No one has any beneficial int rest in the matter except the appellant. This Court unanimously held in *Meriwether* v. *Garrett, supra*, (fifth conclusion) that

The funds collected by him (receiver and back-tax collector) from taxes levied under judicial direction, cannot be appropriated to any other uses than those for which they were raised.

And in the eighth conclusion, the Court said:

> If on the settlement of the accounts of the receiver herein, it shall be found that he has any money in his hands collected on taxes levied under judicial direction, to pay judgments in favor of any persons who have become parties to this suit, an order may be made directing its appropriation to the payment of such judgment.

It needed no argument to show the correctness of these conclusions. They were based on the idea of trust. When a fund is raised for a specific purpose, it becomes a trust fund.

When the Legislature gave the power to the county to raise money by taxation, to pay for this subscription, the power thus given became a *trust*, which the Legislature could not annul. So when the money was raised by the exercise of that power, it became trust money.

Von Hoffman v. *Quincy*, 4 Wall. 554.

The county is here trustee and the appellant is *cestui que trust*. Now if this were a private corporation, there would be no question of the power of the Court to execute the trust. But we have seen that this is a private corporation as to this debt. The mere fact that it is called "tax" does not make it holy.

As was said by Mr. Justice Strong in *Meriwether* v. *Garrett*:

> It can make no difference that the city of Memphis was a municipal corporation. Its charter as such does not affect the nature of its obligation to its creditors, or its *cestui que trust*, or impair the remedies they would have if the city was common debtor or trustee. While as a municipal corporation the city had public duties to perform, yet in contracting debts authorized by the law of its organization, or in performing a private trust, it is regarded by

the law as standing on the same footing as a private individual, with the same rights and duties, and with the same liabilities as attend such persons.

It is a rule that admits of no exception, that equity never wants a trustee, or, in other words, that if a trust is once properly created, the incompetency, disability, death, or non-appointment of a trustee, shall not defeat it. * * * If a trust is cast upon a person incapable of taking and executing it, courts of equity will execute the trust by decree, or they will appoint some person capable of performing the requirements of the trust.

Perry on Trusts, secs. 38, 39.

It is a well recognized principle in equity, as a contract can not be impaired; that where there is any fund to which the creditor has a right to resort for the enforcement or payment of the contract, it will be followed by a court of equity.

Beckwith v. *Racine*, 7 Biss. 146.
Curran v. *Arkansas*, 15 How. 304.
Montpelier v. *East Montpelier*, 29 Vt. 12.

This trust remains unexecuted. Not that its execution is involved in doubt or uncertainty, but the trustee says it cannot execute it; that the agencies through which it must act will not do their duty. It therefore is a neglected trust. The Court is appealed to with jurisdiction of the parties and subject-matter. We ask the Court to take hold and execute the trust through its own officers. The way is clear. The amount due by each person is a lien on his estate. It is as much the duty of courts of equity to enforce liens as to protect and enforce trusts. Both are peculiar subjects for equity jurisdiction. Are the arms of the Court too short to take hold of such a case and grant relief? It

is claimed by appellee that they are. That constitutional liberty would be destroyed, and all the ills which befell the Roman Empire, would rapidly ensue, if the "Sovereignty" of Allen county were invaded by a Federal Court, and that municipality made to pay its debts. While such calamities are to be avoided in proper cases, yet it must be borne in mind that in a previous case between this same appellant and this same appellee, and under exactly similar circumstances, the Circuit Court of the United States in Kentucky appointed a receiver to collect the taxes and pay the debt. That he did collect the taxes as receiver, and no one thought that the dignity or sovereignty of the county was invaded. This idea of the collection of a tax like this being a sovereign act, was born in this case. It started with a misconception of *Meriwether* v. *Garrett.*

The collection of this tax is purely a ministerial act. It has no element of sovereignty about it. The sovereign has no interest in or concern about it. It would be different with a tax for govermental purposes. But this is not of that character. The difficulty here is not one of "defect of law," so claimed by appellee, and the stipulation, *supra*, taxes it out of any such category. If it were true, as claimed by appellee, that no relief could be given except such as the Legislature might provide, why did he stipulate that appellant was without relief or remedy except such as this Court could give? Records are not made up to be taken in a Pickwickian sense. And so the elaborate argument of counsel for appellee to show that no one of the three great departments of government should interfere with another department, has no application here. It is simply the device of lawyers in behalf of repudiators to get "smarter than the law."

The case of *Egerton* v. *New Orleans*, 1 La. Ann. 435, which is so much relied on by appellee, has no application to this case. There a judgment creditor of the municipality undertook to seize and subject to the payment of his judgment the taxes which had been levied for the support and government of the City of New Orleans. There was no levy for the payment of the judgment, and there was no vacancy in the collector's office, but the creditor treated taxes levied for the support of government as assets of the municipality, and attempted to seize them before they got in the city treasury. It was rightly held that this could not be done.

The suggestion, in the opinion of Mr. Justice Matthews, in this case, that failure of remedy was merely casual because no one would act as collector, seems to have been made without reference to the stipulation on file: For there it is agreed that the failure of remedy is permanent, except such as the Court can give. And the mere existence of an office where there is no officer and never can or will be, is certainly not the equivalent of officer.

We think we are entitled to the relief prayer without any departure from well established principles. We do not claim that the mere existence of a case of hardship can of itself give us a right to relief. We ask nothing of that kind.

But we present a case where the creditor has judgment for his debt. It is admitted on all sides to be due, and that it should be paid. The debtor is before the Court, and says it is the mere agent of others in the creation of the debt. That it has no property, but that the principals in the debt who agreed to furnish the money to pay it, and for whom the debt was created,

are before the Court, and the amount due by each is fixed. That these persons are able to pay and ready to pay, but this same agent says, that these persons must be made to pay by legislative process and not by judicial process. This species of jugglery will not be tolerated. "Wherever there is a will there is a way." This Court has eloquently said, that "no man in this country is so high that he is above the law," and we beg to add the homely but forcible expression of a Tennessee Judge: "That no man in this country can get smarter than the law."

Respectfully submitted,

CHARLES EGINTON,

W. O. DODD,

Counsel.

115-55

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Supreme Court of the United States.

OCTOBER TERM, 1885.

T. W. THOMPSON, - - - Appellant,
vs.
ALLEN COUNTY, &c., - - - Appellees.
No. 329

Appeal from Circuit Court of Kentucky.

ARGUMENT FOR APPELLEES.

BROWN, HUMPHREY & DAVIE,
Counsel.

COURIER-JOURNAL JOB PRINTING CO.

Supreme Court of the United States.

OCTOBER TERM, 1885.

T. W. THOMPSON, ... *Appellant.*

VERSUS

ALLEN COUNTY, ET AL., ... *Appellees.*

No. 990.

BRIEF FOR APPELLEES.

In 1869, the Kentucky Legislature chartered the "Cumberland & Ohio Railroad Company," with power to build, equip, and operate a line of railway from Louisville, through the State of Kentucky, to the Tennessee line, in the direction of Murfreesboro.

This projected railway would, it was supposed, greatly benefit a large territory, and provide facilities of transportation to a large population occupying fertile counties in which, as yet, no railroads had been constructed.

As much public benefit was thus anticipated, the Legislature saw fit to permit the extension of aid to the proposed railway by counties and towns along its line, and the power so to do was given by the fifteenth section of the charter. That section, which is the only one of the act pertinent to this discussion, is printed in full as Appendix A to this brief.

By its terms power is given to counties, acting through their County Courts, to subscribe for stock and to issue county bonds in and for the amount of such subscriptions. It provided for the levy of taxes to meet accruing interest on such county bonds and to accumulate a sinking fund. The "*per-*

son collecting" such taxes was required to give tax receipts convertible into stock of the railway company.

The method of collecting the taxes was prescribed in the following words:

"And the mayor and council or aldermen of any city, or the mayor and aldermen, or chairman and board of trustees, of any town, or the *County Court of any county having jurisdiction, may appoint collectors for said tax*, or may require the *sheriffs* or marshals of the respective cities, towns, or counties, within the jurisdiction of same, to collect the said tax, all of whom shall have the same powers and remedies, and shall proceed in the same way for the collection of said tax as the sheriffs in the collection of the State revenue."

By further provision of the same section, a bond is required to be taken from "*the person collecting the tax*," and the compensation, where a sheriff collects, fixed. (See act approved 24th of February, 1869, sec. 15 Session Acts 1869, vol. 1, page 471, Appendix A hereto.)

By an amendatory statute, approved 11th of March, 1870, section four, the duty of collecting the county railroad tax was devolved upon the sheriff, the prescribed compensation secured to him, and his responsibility upon his official bond declared. (See act approved 11th of March, 1870, sec. 4 Session Acts 1869–70, page 226, Appendix B hereto.)

By a still later statute entitled "An act to release the sheriff of Allen county from collecting railroad tax, and other purposes," and which is Appendix C printed herewith, it was enacted as follows:

"SECTION 1. That hereafter the sheriff of Allen county shall not be required to give bond for the collection of any levy or tax in said county for the purpose of paying the principal or interest on the county bonds of said county, issued for railroad purposes, and shall not be held responsible in his official bond for the same.

"SEC. 2. That the County Court shall, at the instance or motion of any person, or by request, appoint a special collector to collect all taxes or levies in said county for railroad purposes, and shall require bonds with security, to be approved by the court, for the faithful discharge of all duties incumbent on him.

"SEC. 3. All laws in conflict with this act are hereby repealed.

"SEC. 4. This act to take effect from its passage." (See Acts of

1876, chapter 169 Session Acts 1876, vol. 1, page 307, Appendix C hereto.)

There is no controversy as to the facts in this case.

The county of Allen subscribed for a large amount of stock, and issued its bonds in payment therefor. The railway company sold the bonds, but utterly failed to build the expected road. The bonds so obtained from the county represented an amount "exceeding one-third of the value of the property in said county."

A number of them came into the possession of the appellant Thompson, and, default having been made in interest, he sued at law, in the Circuit Court of the United States for the District of Kentucky, upon his unpaid interest coupons, and obtained judgment against Allen county for somewhat more than twenty-two thousand dollars. An execution, issued upon the judgment, was returned "no property."

Thompson then sued out a mandamus from the same court, the result of which was that the County Court was compelled to levy, and did levy, a tax of two dollars and eight cents on each one hundred dollars of taxable property, in order to provide a fund to satisfy Thompson's judgment.

He also, under mandamus from the same Court, compelled the County Court to appoint a collector, in conformity with the provisions of the act of 1876 already referred to.

The County Court thereupon, in obedience to the mandamus, undertook to elect a collector, and did elect and appoint one; but no one could be found who would accept the office and perform the duty.

This conclusively appears from the stipulation of facts embodied in the record in the following words:

STIPULATION OF FACTS.

"By leave of the court, the parties now stipulate of record in this cause—

"1. That the County Court of Allen county has in good faith, and diligently, endeavored to find a fit and proper person to act as collector of the railroad taxes in said county, and of the special levies of taxes in the bill of complaint set forth.

"2. That no such fit and proper person can be found who will undertake and perform the office and duty of such collector.

"3. That the complainant is without remedy for the collection of his debt herein, except through the aid of this Court in the appointment of a receiver, as prayed for in the bill, or other appropriate orders of the court." (Printed Record, pages 11 and 12.)

The case was argued upon the statutes already cited and the above stipulated facts, and resulted in a decree dismissing the bill of complaint—the Associate Justice and the Circuit Judge differing in opinion and certifying the points of division to this Court.

The decree will be found on page 12 of the printed record. The certificate of division is on pages 13 and 14.

POINTS.

The questions involved in this appeal can not be better or more succinctly stated than in the certificate of division. Three are thus presented.

I.

Whether taxes levied under judicial direction can be collected through a receiver appointed by a Court of Chancery, if there be no public officer charged with authority from the Legislature to perform that duty.

II.

Whether taxes levied by State officers under judicial direction can be collected through a receiver appointed by a United States Circuit Court in equity, where the Legislature has provided an officer to collect them, but there is a vacancy in the office, and no one can be found who is willing to accept the office.

III.

Whether a Court of Chancery can grant any relief to complainant upon the facts recited in the bill, answer, and stipulation, as presented by this record.

The decree from which this appeal is prosecuted answers each of these propositions in the negative.

The record now before the Court presents no case of contumacy, no evasion of statutory or judicial mandate, no complaint of any unperformed duty.

The sole difficulty lies in the refusal of a citizen to accept from the County Court an appointment as collector of a levied tax, and in the further fact that no officer or person, other than such collector so appointed, is by law authorized to collect such tax.

The trouble arises not in the refusal of any constituted agency of the law to perform its prescribed and statutory duties, but in the fact that an office, created and defined by statute, and upon the incumbent of which certain important duties are laid, remains unfilled because the appointee declines to accept.

The difficulty is a *defect of law*, and that only.

And the question here involved is practically whether the judicial power will cure, or attempt to cure, the omission on the part of the Legislature, and supplement the statute by giving to a receiver in equity power to do what the failure of the statutory officer to qualify leaves unperformed.

The case, thus divested of any of the disturbing elements that so frequently enter into the suits of bondholders against municipalities, presents a question of *power*, pure and simple, and whether the power be judicial or legislative.

The Constitution of Kentucky very carefully distinguishes and curbs the three great governmental powers. The very first sections of its first article declares:

"SECTION 1. The powers of the Government of the State of Kentucky shall be divided into three distinct departments, and each of them confined to a separate body of magistracy, to-wit: those which are legislative to one; those which are executive to another; and those which are judicial to another.

"SEC. 2. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." (Constitution of Kentucky, Article I.)

The limitations of the Federal Constitution in this respect are equally stringent, as this Court has declared:

"The Constitution divides the powers of the Government which it establishes into three departments—the executive, the legislative, and the judicial—and unlimited power is conferred upon no department or officer of the Government. It is essential to the successful working of the system that the lines which separate those departments shall be clearly defined and closely followed, and that neither of them shall be permitted to encroach upon the powers exclusively confided to the others." (Kilbourn vs. Thompson, 103 U. S., 169.)

The levying of taxes and the collection of them after proper levy are among the most important of governmental powers; and from the fact that these are governmental functions they must necessarily be distributed to some one of the three great powers.

And the *power of taxation is legislative, and not to be exercised otherwise than under the authority of the Legislature* (as was unanimously held by this Court in the third proposition of the opinion in Meriwether vs. Garrett, 102 U. S., 501). In the distribution of governmental powers it falls to the legislative branch. So located, it is not to be invaded by the judicial power, nor should the latter "be permitted to encroach upon the powers exclusively confided to the other." (Kilbourn vs. Thompson, 103 U. S., 169.)

The Kentucky Court of Appeals has, in a recent decision, clearly confined the taxing power to the legislative and excluded it from the judicial branch of the Government.

"The power to impose taxes is legislative, and can not be conferred, under our Constitution, upon a strictly judicial tribunal or officer. The power to *assess* property for taxation—that is, to apportion the tax upon the property upon which the Legislature has imposed it—is not judicial, and can no more be conferred upon a judicial tribunal than the power to *levy* taxes." (Pennington vs. Woolfolk, 79 Ky., page 16.)

Judge Cooley, commenting upon the strict exclusion of the judiciary or executive from the taxing power, remarks, quoting in part from Chief-Justice Marshall:

"The legislative makes, the executive executes, the judiciary construes the laws. The Legislature must, therefore, determine all questions of State necessity, discretion, or policy involved in ordering a tax and in apportioning it; must make all the necessary rules and regulations, which are to be observed in order to produce the desired returns; *and must decide upon the agencies by means of which collections shall be made.*" (Cooley on Taxation, page 33.)

In the separate opinion of Mr. Justice Field (speaking for himself, Mr. Justice Bradley, and Mr. Justice Miller), in the case of Meriwether vs. Garrett, he uses these words:

"The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the Legislature upon considerations of policy, necessity, and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. * * * Having sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the taxes shall be collected, and to designate the officers through whom its will shall be enforced." (102 U. S., page 515.)

And further on he says:

"But this has been the limit of its (the judiciary's) power. It can not make laws when the State refuses to pass them. It is itself but the servant of the law. If the State will not levy a tax or provide for one, the Federal judiciary can not assume the legislative power of the State and proceed to levy the tax. If the State has provided incompetent officers of collection, the Federal judiciary can not remove them and put others more competent in their place. If the State appoint no officers of collection, the Federal judiciary can not assume to itself that duty. It can not take upon itself to supply the defects and omissions of State legislation. It would ill perform the duties assigned to it by assuming power properly belonging to the legislative department of the State." (102 U. S., page 521.)

That the foregoing expressions, as used by Mr. Justice Field, were in full accord with the established rulings of this Court is evident from former decisions. Thus, in Heine vs. Levee Commissioners, 19 Wallace, the opinion of the court, delivered by Mr. Justice Miller, was concurred in by Mr. Justice Strong, who wrote the dissent in Meriwether vs. Garrett. It is there said:

"It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the State Government." (19 Wallace, page 661.)

In Rees vs. Watertown, 19 Wallace, Mr. Justice Hunt had already spoken for the Court in such terms as made the decision in Heine vs. Levee Commissioners a sequence to its doctrine.

And, to show the attitude of the local law, the case of McLean County Precinct vs. Deposit Bank of Owensboro, 81 Kentucky, 254, may be cited as the latest.

The point there presented is precisely the one here involved.

In that case it appeared that the McLean precinct No. 3 had duly subscribed in and for a railroad, and had issued its bonds. By the State statute authorizing the subscription, the county judge was *required to appoint a collector of said tax so levied in said precinct*, such appointment to be made upon the recommendation of the justices; or, should they make no recommendation, upon the county judge's selection.

A suit in equity was brought by holders of unpaid coupons, their allegation being that the county judge had, in good faith, endeavored to find a collector of the tax, but no proper person could be found to accept the position.

A rule was granted against a number of taxpayers, to pay into court the taxes levied on the railroad assessment and alleged to be owing by them. Executions were issued upon the rules, made absolute, and an appeal was prosecuted.

The Kentucky Court of Appeals, in passing on the right thus to collect taxes, cites the cases of Heine vs. Levee Commissioners, Barkley vs. Levee Commissioners, and Meriwether vs. Garrett, and refers to Wolf vs. New Orleans and Rees vs. Watertown. It also adopts the opinion of Mr. Justice Matthews, delivered in the case at bar, on the circuit. The conclusion announced is that the Chancellor had *not* the power

"To collect the taxes by his receiver or the tax-collector appointed by him, when it appeared that the county judge could find no one in

the precinct willing to accept the office." McLean County Precinct vs. Deposit Bank, 81 Kentucky, 254.

The *collection* of the tax, as well as the assessment and the levy, is thus seen to belong to the legislative department of the Government. The process of taxation, from the beginning to the end, is only as the Legislature directs. The Legislature provides a certain mode for the creation of the municipal debt, which must be pursued. It provides a certain mode of assessing and levying a tax to pay it, which must be pursued; and it provides a certain mode of collecting that tax, which must also be pursued.

Thus, in Egerton vs. New Orleans, 1 Louisiana Annual, 439, where a creditor of a municipal corporation sought, on a judgment and return of *nulla bona*, to compel the taxpayers to pay their taxes to the court's officer for the satisfaction of plaintiff's debt, the Court said:

"The taxes in this case were seized in the hands of the corporators after their assessment and before their collection. The attributes of the taxing power, as may be seen in every English statute upon the subject of taxation, are, the imposing, levying, collecting, receiving and taking the tax. The collecting and receiving are as much a part of that power as the levying and imposing. The power would be precarious otherwise; and, as the plaintiff admits that he had no power to impose and levy the tax, it necessarily follows that he could not lawfully collect and receive it."

If there is any defect or practical imperfection in any of the provisions, by which it is made difficult or impossible to collect the tax, the remedy is to apply to the same legislative power to better its work by an amending act. But the courts can no more supply the defects than they could pass the original act. The power of the courts is confined to a mandamus to compel the officers, selected by the Legislature, to perform the duties which the Legislature has instructed them to perform. The courts can not provide other officers nor different modes of collecting. If the statute is not capable of complete execution by reason of there being no one willing to accept the office of assessor or collector, the remedy is not in

the courts, but in the Legislature. The Legislature must be asked to amend the former act, so as to provide other officers of assessment or collection. Or the Legislature must be asked to amend the act by providing that the machinery to collect the tax may be a receiver appointed by a Federal Court. If it so enacts, then the Federal Court's *receiver* becomes a *legislative* officer, and the collection of taxes by him is done under *legislative* authority. But if the legislative act provides that the taxes shall be collected by a sheriff, elected by the people of the county, or by a collector, elected by the magistrates of the county, and the Federal Court *then* appoint a *receiver*, and *he* collects them, what else is it but a judicial amending or repeal of that legislative provision?

The Constitution has confided the sole power in certain matters to the judicial department. If that department fails or neglects to perform its duties, they must go undone until new judges can be secured. In like manner the Constitution has confided certain other duties and powers to the legislative department. If that department fails or neglects to properly attend to those duties, or to properly execute those powers, it is not for the officers of any other department to step in and perform them; but they must remain unperformed until a new legislative body can be secured who will perform them properly. And so with the executive department.

It is true that the maintenance of this principle may, like the maintenance of any general principle, entail hardships in some individual cases; but to sacrifice the principle would lead to far greater evils, and "all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of our Government, and is essential to its successful administration." In short, all of our officers are but limited or special agents. If any officer be a general agent—empowered to interfere in any department which he thinks is not doing its duty—he is a king.

If the principle be once established that the judicial department will—where the legislative department refuses to amend its tax laws so as to "do justice"—take upon itself to

supply the defect by appointing its own attaches to do the work, there is an end to this theory of the three departments.

We will then have each department interchangeably supplying, by its modes, the supposed defects or omissions of the other departments. We will have our judges collecting taxes because the Legislature fails to amend its tax acts as the judges think they should be amended; and we will have the Legislature amending or annulling the Courts' judgments because the Courts fail to render the kind that the Legislature thinks they should in justice render.

It will then often happen that the Legislature will determine on one line of policy and the Courts will determine on another. An unseemly conflict will be the result.

Thus, in this very case, the Legislature, if applied to, will do one of two things: It will pass an amending act providing a different and more speedy or practicable mode of collecting said taxes, or it will refuse to do so. If it passes the amendment, the complainant will have applied to the proper department, and will have obtained his lawful remedy; and all this without any usurpation of power. If it refuses to amend, then that means that the Legislature's idea of the proper policy—and it is the department to determine that policy—is that matters shall stand as they are, and that the governmental power of exacting and enforcing sales on the already overburdened citizens of that county should not be exercised in a more summary and speedy mode than that now existing. It would mean that the Legislature thought it the proper policy to leave the bondholders of that county where they voluntarily placed themselves when they took those bonds, and not to give them the gratuity of additional remedies not bargained for.

Now, if the Legislature adopts the latter course, and the Court proceeds to supply the amendment which the Legislature refused, it will simply establish as a principle, that, if the judicial department conceives that there is a failure or delay of justice by reason of non-action or wrong action of the legislative department, it will proceed to cure it by judicial action.

Under such a state of things what becomes of the provisions of the Kentucky Constitution and of the doctrine in Kilbourn vs. Thompson, 103 U. S., above quoted?

The collection of taxes not being a matter confided to the judicial department, and the Legislature having provided a mode of their collection—to-wit, by "levy" and a collector to be appointed and bonded by the Allen County Court—that mode is to be treated as the only proper mode, and the Courts can not supply another merely because that mode turns out not to be as good a mode as some other mode might have been, nor, indeed, because that mode is wholly impracticable at present, or seems to be permanently impracticable. It is for the Legislature, and not for the Courts, to amend defective legislation.

It is seen, therefore, that if authority is to control, the best approved text-books, as well as the chief decisions of Federal and State Courts, go to put the "*collecting*" of taxes upon precisely the same plane as their "assessment" and "levy."

And if this be so—and there is not a decided case to the contrary—it necessarily follows that the Courts can go just so far, as to the one, as they may in regard to the other, and no farther.

But the power of Courts of Equity has never been exerted to compute and decree a levy. Its utmost and only stretch has been to compel some one or more persons, clothed by statute with the right or duty of levying, to exercise that statutory power as the law required it should be.

No Board of Levee Commissioners has in any of the cases been nominated by a *Court* to supply a vacancy caused by resignation or refusal to qualify.

In Heine vs. Levee Commissioners the incumbents of the statutory office resigned, and by so doing frustrated the just claim of the plaintiff. But the Court did not proceed to procure relief for the plaintiff by nominating a new board, or appointing a receiver or other officer to act in lieu of the resigned officials.

The limit to which this Court there went, as expressed in

the opinion from Mr. Justice Miller's pen, was to sanction the peremptory command addressed to the statutory agencies. And inasmuch as these agencies had resigned, the mandatory writ simply came back unexecuted.

The Court of Equity refused to entertain a bill for relief for the reason that it found no statutory official upon whom compulsory process could operate.

Therefore it was that in Heine vs. Levee Commissioners, 19 Wallace, the Court *made no levy*, nor ordered any to be made. Had there been an official board, upon the members of which the compulsory process could have been made effective, a Court of Equity might, perhaps, in a proper case, have compelled the making of a levy, just as the law Court awarded its mandamus.

But there being no existing agency to whom the command could be directed, the Court withheld its hand. It made no levy; it made no collection; it appointed no substituted agent; and this Court emphasized the doctrine that (as the syllabus puts it) the power to *levy* and *collect* taxes is a legislative function in this country, and does not belong to a Court of Equity, and can only be enforced by a Court of Law through the officers authorized by the Legislature to levy the tax.

The same reason will be found to underlie the decision in Rees vs. Watertown. No levy was there made, nor was any collection made by the Equity Court, directly or through a receiver substituted to the powers or duties of the statutory agency.

The power of the judiciary was applied no further than to command a performance of their statutory duty by those whom the legislative power had clothed with that duty. The Court stood ready to compel these (if they existed or could be found) to act fully and efficiently. But the mandamus, the alias, and the pluries brought about neither levy nor collection, because the agency constituted by legislation had ceased to exist.

The Court refused to supply the defect, either by appointing other agencies or by clothing a receiver with the abdicated statutory powers.

In like manner, in Barkley vs. Levee Commissioners, 93 U. S., where Mr. Justice Bradley spoke for the unanimous Court upon the question of ordering a levy to be made, the same line of reasoning was pursued.

There the question, much simpler, and nearer apparently to the admitted powers of the judiciary, was whether a mandamus to compel a levy and collection of tax should be awarded against those who had been, but no longer were, officials clothed with power to levy and collect.

The ruling there was that the board, having gone out of office, was not amenable to mandamus, and that, there being no statutory agency in existence, the Court would not cure the defect in the law by ordering its marshal to lexy taxes.

On the circuit bench Mr. Justice Bradley held, and it was affirmed on appeal, that

> "If the officers who are charged with the duty of levying or collecting taxes refuse to perform their functions, the Court, in a clear case of failure, and at the instance of a party directly interested, can, by prerogative writ of mandamus, compel them to perform acts which are ministerial, as distinguished from those which are judicial or discretionary. This is all that the judicial department can do on the subject, unless the Legislature has expressly conferred upon it further powers." (1 Woods, 247.)

Thus it appears from controlling and often-reviewed decisions that the power of the judiciary over the subject of levying taxes has been accurately and repeatedly defined. In no instance has it ever been pushed to the extent of decreeing a levy or directing a commissioner or other judicial appointee to enter up a levy of tax. The right to instruct the marshal to make a levy of tax has been expressly and uniformly disclaimed.

The power of the Courts to compel those charged by law with the duty of levying taxes, to do that duty has been abundantly commented upon and amply sustained, but no further has any Court gone.

But the *levying* of a tax is only one step in a series of which the *collecting* is another.

"The collecting and receiving are as much part of that power as the levying and imposing." (Egerton vs. New Orleans, 1 Louisiana Annual, 439.)

The power requisite in the act of *levying* is the same in quality as that needed to justify a *collection*. It is of legislative conference in each; and the exercise of the power of *collection* must, like that of levying, be by and through an agency of legislative creation.

The necessity for a legislative designation of a levying agent has been abundantly declared. The same reasoning irresistibly proves that he who *collects* a tax must derive his authority from legislative and not from judicial designation.

And inasmuch as Courts will not enforce a *levy* of tax, save by and through agencies designated by the Legislature, so will they refuse to compel any *collection*, except by and through such agents as the legislative branch has said may or shall collect.

It is obvious that the equal importance and identical nature of these two powers, *levying* and *collecting*, have been in the thought of all the Courts that have discussed the subject.

As has been observed, the Supreme Court of Louisiana (1 Louisiana Annual, 439) carefully places them each in the same category.

In Heine vs. Levee Commissioners (1 Woods, 247), as appears from the quotation already given, Justice Bradley speaks of the duty whether of *levying* or *collecting* as coming under the same rule.

In the appeal of that case to this Court the synopsis of the discussion is that "the power to *levy* and *collect* taxes is a legislative function." (19 Wallace.) In Barkley vs. Levee Commissioners (93 U. S.) the two powers of "levying taxes" and "collecting taxes" are rated as of the same nature and of the same derivation, and to be exercised under like (and legislative) authority.

In Rees vs. Watertown, 19 Wallace, the discussion covers

alike the levying and the collection of tax, and the difficulties in the way of one are shown to apply to the other.

The Kentucky Court, in construing the powers of its Equity Courts in matters of taxation, connects the two powers of impost and collection as being alike, and purely legislative. (81 Kentucky, 254.)

Thus, it appears that whatever is true as to the power of the judiciary in matters of *levying* taxes is equally true as regards the *collecting* of taxes; and the conclusion can not be escaped that if the power of the Courts as to levy of tax stops with the order to make a levy of tax addressed to the agency empowered by the Legislature to make a levy, so, in matters of collection, after levy, the judicial power can go no further than to order him, whom the Legislature has designated, to collect the tax.

And as a collection of tax can find no support in law unless there be, first, a lawful imposition of the tax, and (as has been frequently seen) a lawful levy of tax may yet result in no *collection*, it seems to follow that each is an essential step, each regulated by the same rules of law and considerations of constitutional power.

And if this be true—and there is no contravening authority to be found in any of the decisions—the power of the Courts to collect taxes after levy can go no further than to compel the agents, whom the Legislature has pointed out, to do their duty, and such an order can be addressed to none but the agents of legislative selection.

As the Courts have never named their own agent to levy, so can they not name their own agent to collect taxes, nor has it ever been done.

There is no room for doubt that a perfectly valid and lawful imposition and levy of tax may result in a fruitless endeavor to have that tax collected, and in an utter failure to find a lawful collector.

Such was the case in Meriwether vs. Garrett, as the fourth conclusion of the Court expressly declares. It is there said by the Chief-Justice that—

"Taxes levied according to law before the repeal of the charter * * * * can not be collected through the instrumentality of a Court of Chancery at the instance of the creditors of the city." (102 U. S., 501.)

Inasmuch, then, as the collection of "taxes levied according to law" can not be enforced "through the instrumentality of a Court of Chancery," it would seem that an end of the present discussion had been reached, and the necessity of an affirmance demonstrated. For, looking at the particular case, it can not be denied that taxes were levied upon the taxable property in Allen county, and it is equally certain from the record that they were levied *before* the refusal of office by the appointed collector. And it is conceded on all hands that the embarrassments of the bondholder's right to be paid are caused entirely by such failure (after levy) to find a collector.

The tax in Allen county must be regarded as one "levied according to law." It would hardly be tolerated (were it desired) to dispute that fact. And if a dispute were indulged, its result would be to terminate this appeal in a "*reductio ad absurdum*." The tax was either "levied according to law"—that is, lawfully—or it was "levied not according to law"—that is, unlawfully. If "levied according to law," or "lawfully," the affirmative portion of the fourth conclusion in Meriwether vs. Garrett applies. If, however, the tax levy was "not according to law," or "unlawfully," the absurd contention is presented of an effort to procure aid in equity by extraordinary process to enforce the performance of an unlawful act.

It remains to be considered whether the case at bar is to receive a different solution than that already argued for, by reason of the propositions reserved from conclusive decision in the fourth point of Meriwether vs. Garrett.

In announcing the conclusions of the Court, the Chief-Justice, after declaring the general law as before quoted, says:

"Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed

by a Court of Chancery, if there be no public officer charged with authority from the Legislature to perform that duty, is not decided, as the case does not require it." (102 U. S., 501.)

The certificate of division in this record narrows this reservation to the question whether taxes levied under judicial direction can be collected through a receiver appointed by a Court of Chancery.

1. "If there be no public officer charged with authority from the Legislature to perform that duty," or,
2. If "the Legislature has provided an officer to collect them, but there is a vacancy in the office, and no one can be found who is willing to accept the office." (Printed Record, page 13.)

As regards the first of these points, it is admitted by the bill of complaint that the County Court of Allen county did elect and appoint a collector; and that such an officer was provided for by law is evident from the statute already cited.

"—The County Court shall, at the instance or motion of any person, or by request, appoint a special collector to collect all taxes or levies in said county for railroad purposes." (See Act of 1876, Appendix C hereto.)

It is true that the "public officer charged with authority from the Legislature," though thus provided for by statute, and though elected and appointed in exact accordance with law, fails to enter upon the duty. The office is still provided for and still exists; the incumbency of office is vacant.

But this is, as remarked by Mr. Justice Matthews, a casual vacancy. It is caused by no want of explicit law, nor by any failure of the County Court to appoint. The law provides for a collector, and how he shall be elected and appointed. He has been appointed in conformity with law. The mandamus of the law Court has been obeyed.

Thus, as we contend, an exact parallel is presented to the difficulty that was encountered in the cases already commented upon.

In Rees vs. Watertown the law provided "public officers charged with the duty of levying and collecting the tax."

But by personal and individual action these public officers, each and all, resigned, not only in such manner as to defeat the effect of the mandamus, but for the plain purpose of defeating it. There was left "no public officer (actually in office) charged with authority from the Legislature." The public office remained. Yet, though the alias and the pluries mandamus were in turn without effect, because of the recurring and casual vacancies thus existing, this Court refused to regard that fact as authorizing equitable interference. It was not suggested that the failure of three writs of mandamus, traced to such a cause, gave any greater right to invoke equitable interference than any single casualty.

The same will be observed in Heine vs. Levee Commissioners, where the resignation of the commissioners left the statutory office vacant, because of personal unwillingness to serve. The "public officers" were still provided for by law. Individuals chose to resign or declined to serve; and equity refused to interfere, though the incumbents (if any) of the office would doubtless have been amenable to mandamus.

It does not by any means follow, from the refusal of office by the appointee in this case, that a like unwillingness to accept the office of collector will exist for all time to come, and on the part of an entire population.

The experience of this republic is opposed to any such suggestion.

And when the admitted efforts of the Allen County Court to find a collector shall at last be crowned with their merited success, it is submitted that complainant will have his remedy. The temporary difficulty of vacancy being obviated, he will have his writ of mandamus. The statute will not have changed. The duties of the incumbent will be the same as now; but there will be an incumbent for the mandamus to operate upon.

As to the second point of division certified in the record, the remarks already submitted are believed to reach the question.

We have endeavored to show that throughout all respect-

able authority the "collection" of a tax is placed upon precisely the same footing as the levying of a tax.

If the one be the creature of legislative power, so is the other. If the one must be exercised by that agency which the Legislature designates, so must the other. If the agencies designated by the Legislature to make a tax levy can not be displaced or replaced or supplemented by other agencies named by the judiciary, neither can the collecting agencies.

The arguments which have put the levying of taxes, through commissioners or masters in Chancery, utterly beyond judicial power, must be equally potent to prohibit collection of taxes through a receiver in equity.

It is freely admitted that the judiciary will see to it in every proper case, that the tax officers designated by the Legislature do their duty. The writ of mandamus will go to compel the levying or the collecting official to levy or collect in exact accordance with his duty under the law.

But in no case has the resignation or refusal to qualify on the part of a tax-levy official been held to warrant a decree that the master in Chancery make the levy.

In no case has the resignation of a collector of taxes, whose duties are prescribed by statute, or his declining to qualify, been held to warrant a decree appointing a receiver with power to do the duties of the collector.

The power to make a tax levy through a commissioner of Court would not now be seriously claimed by any judicial tribunal. The considerations that prohibit such a claim of power apply equally, and in every respect, to a collection of a levied tax.

It is not perceived how the mode of collecting a tax, or the power of the judiciary as to collections of levied taxes, can be affected by the fact that the levy may have been made in obedience to mandamus.

It is true that no opinion upon the power of an Equity Court in such case was expressed in Meriwether vs. Garrett. As such a condition of fact did not there exist, the Court expressly declined deciding the point.

But, as has been suggested, the levy, when made under judicial direction embodied in a writ of mandamus, is at last—and in every case has been—a levy of tax made by the agency provided by the Legislature in accordance with the power on it conferred by the Legislature.

If such an agency proceed to do its statutory duty and voluntarily perform its functions, the power conferred by the Legislature is executed and the way is clear for the next and equally statutory act of collecting.

If voluntary performance of such levying duty be neglected or refused, the Courts will enforce the performance by mandamus; but in so doing they confer no additional *power*, nor do they give any greater sanction to the already-conferred power.

And whether the duty of levying the tax be willingly or unwillingly performed; whether the officer charged with the duty of levying perform it of his own accord, in prompt obedience to the statute, or reluctantly and under an order to do what the statute commands, it would seem to matter nothing. In either case, the preliminary statutory step of levying the tax will have been executed.

It is submitted that compelled performance of one statutory duty by those charged with its performance can not, by any just reasoning, implicate the performance of another and different duty charged upon a wholly different agency.

Nor can we appreciate the contention that because mandamus has been necessary and effective against the first, that thereby equitable jurisdiction with plenary powers attaches as to the second.

It will be borne in mind that the County Court of Allen county has never been empowered to "collect" the railroad tax. Its functions ceased with the levy and the appointment of a collector. Upon that officer, and upon him alone, the law devolves the duty and the power of collecting. No other person or agency can give the citizen a valid receipt convertible into stock.

The stipulation shows that the response to the mandamus

was sufficient, and that the County Court performed its whole duty.

Nor is there any dereliction of duty upon the part of that other statutory agent called the collector. It is not complained that the appointee will not carry out the law, but that he declines the office, and that no one will have it.

And the gist of appellant's contention is, that *because* the County Court was compelled by mandamus to make a levy of tax and appoint the collector provided for in the statute, that *therefore* the collector declining to accept office, power resides in the Chancellor to clothe his receiver with the collector's powers and substitute him to the office. The asserted conclusion by no means follows.

If such power exists, it is certainly not conferred by statute. Numerous well considered decisions deny that it is inherent in a Court of Chancery. There is no existing statute which says that a receiver in equity shall have and execute all the powers of a statutory tax collector designated for a particular duty.

From whence, then, is such a power to come to such a receiver? Not from the State Courts, as has been distinctly announced in the McLean county case, 81 Kentucky, 254, nor from the Federal judiciary, which "can not make laws when the State refuses to pass them."

The "collection," being a matter that belongs to the authority of the State, must be left, where the agency fails, to legislative relief. For, as is said by Mr. Justice Matthews in the opinion in this record:

> "The levy and assessment is a step in the process of which the collection is another, and that proceeding is the only agency known to the law by which the desired result can be reached. The jurisdiction of this (Circuit) Court is confined to compelling the State officers to perform their duty under the State laws, and no substitute can be invented."

And we submit that the expressions used by Mr. Justice Field in Meriwether vs. Garrett completely sum up the doctrine justly deducible from the older cases:

"It (the Federal judiciary) can not make laws when the State refuses to pass them. It is itself but the servant of the law. If the State will not levy a tax or provide for one, the Federal judiciary can not assume the legislative power of the State and proceed to levy the tax. If the State has provided incompetent officers of collection, the Federal judiciary can not remove them and put others more competent in their place. If the State appoints no officers of collection, the Federal judiciary can not assume to itself that duty. It can not take upon itself to supply the defects and omissions of State legislation. It would ill perform the duties assigned to it by assuming power properly belonging to the legislative department of the State." (102 U. S., 521.)

The third point of certified division needs no special comment. Its decision hinges upon the determination of the two first.

Outside of the question of a receiver to exercise the functions of the collector, there is nothing of practical bearing.

There have been instances—as in Supervisors vs. Rogers, 7 Wallace—where a receiver in equity has been clothed with the collecting power in matters of taxation. *But in such case resort has been had to a legislative provision authorizing it, and in each case the permissive statute is cited.* So unusual and contrary to admitted and inherent judicial power is such a proceeding that this Court has uniformly justified itself in such cases by quotations from the State law.

In Kentucky, as has been decided in McLean Precinct vs. Deposit Bank, 81 Kentucky, 254, no such power of substitution has been conferred on the Courts. That case construed the identical statutes here involved.

The present case is, therefore, one uncomplicated with side issues or modifying statutes. The critical question presented is whether a Chancery Court can substitute its receiver to the powers and duties of a tax-gatherer provided for by statute, appointed according to law, but who has refused to qualify, or, having qualified, has resigned.

Believing that such an innovation as is absolutely requisite to support appellant's contention will not commend itself to the wisdom or conservatism of this Court, nor be found

to square with well-matured authorities, we, with great confidence, pray for an *affirmance*.

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APPENDIX A.

Section 15 of the Act of the Kentucky Legislature Chartering the Cumberland & Ohio Railroad Company.

Section 15. That any city, town, or county through which said proposed road shall pass, is hereby authorized to subscribe stock in said railroad company in any amount any such city, town, or county may desire; and the County Court of any such county is authorized to issue the bonds of their respective counties in such amount as the County Court may direct; and the chairman and board of trustees or mayor and aldermen of any town, and the mayor and aldermen or council of any city, are hereby authorized to issue the bonds of their respective towns or cities in like manner. All said bonds shall be payable to bearer, with coupons attached, bearing any rate of interest not exceeding six per cent. per annum, payable semi-annually in the city of New York, payable at such times as they may designate, not exceeding thirty years from date; but before any such subscription on the part of any city, town, or county shall be valid or binding on the same, the mayor and aldermen, or chairman and board of trustees of any town, the mayor and aldermen or council of any city, and the County Court of any county having jurisdiction, shall submit the question of any such subscription to the qualified voters of such city, town, or county in which the proposed subscription is made, at such time or times as said chairman and board of trustees or mayor and aldermen of any town, mayor and aldermen or council of any city, or the County Court of any county as aforesaid, may by order direct; and should a majority of the qualified voters voting at any such election vote in favor of subscribing said stock in said railroad company, it shall be the duty of such County Court, trustees, or other authorities aforesaid, to make the subscription in the name of their respective cities, towns, or counties, as the case may be, and proceed to have issued the bonds to the amount of such subscription as hereinbefore directed; and the mayor and aldermen or chairman and board of trustees of any town, mayor and council or aldermen of any city, or the County Court having jurisdiction in any such county that may subscribe for stock in said railroad company, are hereby authorized and required to levy annually and collect a tax upon the taxable property in their respective cities, towns, or counties, as listed and taxed

under the revenue laws of this State, a sum sufficient to pay the interest on said bonds as it accrues, together with the cost of collecting the same. They are also authorized and required to make provision for paying said bonds at their maturity; and to enable them to do this they may establish a sinking fund and loan out the same at any rate of interest they can obtain, and, if necessary, collect the same by law, or may adopt such other means as to them may seem proper and expedient, and may levy and collect taxes annually or otherwise on the property aforesaid for this purpose. The person collecting said tax shall give tax receipts for the same; and any taxpayer paying tax to said road under the provisions of this act shall be entitled to stock in said railroad company to the amount of taxes he may pay; and the cities, towns, or counties under whose subscription the tax is levied shall be divested of stock to the extent of stock issued on said tax receipts, and whenever such receipts to the amount of one share or more shall be presented to the company, or an officer or agent designated by it, a certificate of stock shall be issued for a fractional part of a share: *Provided*, that the said cities, towns, or counties shall receive no dividends on their stock, but the holders of stock issued on said receipts as aforesaid shall be entitled to the same dividends and to all the rights and privileges as the original and cash stockholders: *And provided further*, that said company may in any way that may seem expedient to it, provide for and pay, each or any year, to the cities, towns, or counties, or any of them, the amount of tax levied by reason of said bonds, and thus stop the collection of tax for that year: *And provided further*, that the company may purchase said bonds and surrender them at any time to the cities, towns, or counties issuing them, and have the same canceled; and the mayor and council or aldermen of any city, or the mayor and aldermen or chairman and board of trustees of any town, or the County Court of any county having jurisdiction, may appoint collectors for said tax, or may require the sheriffs or marshals of the respective cities, towns, or counties within the jurisdiction of the same, to collect the said tax, all of whom shall have the same powers and remedies, and shall proceed in the same way for the collection of said tax, as the sheriffs in the collection of the State revenue. The mayor and aldermen or chairman and board of trustees shall require and take from the person collecting the tax a bond with sufficient sureties, conditioned as they may think best. If the collections are made by the sheriff or marshal, they shall settle and pay over the tax at the same time that sheriffs are required to pay

the State revenue; and for their services in collecting they shall in no case be allowed more than three per cent. commission on the amount collected. That if preferred, the application herein authorized to be made to the County Court may be made to the presiding judge of the County Court; and all the powers herein given to the County Court are hereby vested in the presiding judge of the County Court. At all meetings of the stockholders for the purpose of electing officers, or any other purpose, the said towns, cities, and counties may, by proxies duly authorized by the authorities thereof, cast a vote for each share of stock so subscribed by said town, city, or county: *Provided*, that whenever certificates of stock shall be issued to persons residing therein for taxes paid, the stock represented by such certificate shall be deducted from the stock represented and voted for by said proxies, and said taxpayers shall be entitled to one vote for each certificate so issued to them, representing one share of stock. (See Session Acts, 1869, Vol. I, pages 471 and 472.)

APPENDIX B.

Act of the Kentucky Legislature Amending the Charter of the Cumberland & Ohio Railroad Company.

Section 4. That upon the application of the president of said company, the County Courts of the several counties through which said road or any of its branches may pass, or be located in, may submit to the qualified voters of one or more election districts of such county, whether they will be taxed a sum, to be fixed in the order of submission, to aid in the construction of said road, or any branch thereof: *Provided*, that if, after thirty days' notice, a majority of justices do not assemble, the county judge shall order said election; and if said tax shall be voted for by a majority of the qualified voters of such precinct or precincts voting at such election, then the county judge shall levy a tax annually upon all the property in said precinct or precincts, subject to taxation for State revenue, sufficient to pay said sum in three years, provided said tax shall not exceed one per cent. of the taxable property of such precinct or precincts in any one year. The sheriff of the county in which said tax shall be levied shall collect the same at the time that he collects the State revenue, and be allowed the same commission therefor, and shall settle for and pay the same to the treasurer of said company at the time he is required by law to settle and pay over the county levy; and he and his securities on his official bond shall be responsible for the same, and for the same damages for the failure to collect, or non-payment of the same, that sheriffs by law are liable for on account of not paying over the State revenue, to be collected in the same way; and said company shall, on the presentation of the receipts hereby required to be given by said sheriff to each taxpayer for taxes so paid by him or her to the amount of one hundred dollars, issue a certificate of stock to the legal holder thereof; and said receipts are hereby made assignable. (See Session Acts, 1869–70, Vol. II., page 226.)

APPENDIX C.

Act of the Kentucky Legislature Regulating the Collection of the Railroad Tax in Allen County.

Chapter 169.

An ACT to release the sheriff of Allen county from collecting railroad tax, and other purposes.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. That hereafter the sheriff of Allen county shall not be required to give bond for the collection of any levy or tax in said county for the purpose of paying the principal or interest on the county bonds of said county issued for railroad purposes and shall not be held responsible in his official bond for the same.

2. That the County Court shall, at the instance or motion of any person, or by request, appoint a special collector to collect all taxes or levies in said county for railroad purposes; and shall require bonds, with security, to be approved by the Court, for the faithful discharge of all duties incumbent on him.

3. All laws in conflict with this act are hereby repealed.

4. This act to take effect from its passage.

(Became a law by reason of not being returned by the Governor within ten days.)

(See Session Acts, 1876, Vol. I, page 307.)